

H. C. MITRA'S
INDIAN LIMITATION ACT
(ACT IX OF 1908)

As amended up to 1926

EDITED BY
B. B. MITRA, B.A., B.L.

**AUTHOR OF CRIMINAL PROCEDURE CODE, TRANSFER OF PROPERTY
ACT, INDIAN SUCCESSION ACT, INDIAN STAMP ACT, PRO-
VINCIAL SMALL CAUSE COURTS ACT, GUARDIANS
AND WARDS ACT, ETC, ETC**

**"The plea of limitation is by no means a generally dishonourable
defence: it might often be a righteous defence."**

EIGHTH EDITION
1927

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PREFACE TO THE EIGHTH EDITION.

In this edition I have again thoroughly revised the book, bringing the citations into conformity with the words of the judgment as far as possible. The case-law has been cited down to the end of 1926, and parallel references have been given throughout to the Indian Cases and the All India Reporter.

The notes are numbered, as in the previous edition, and the references in the Index and the Table of Cases are to the numbers of the notes, and not to the numbers of pages.

About 750 new cases have been added in this edition.

The 1st January, 1927

B B MITRA.

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The 15th January, 1927

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THE INDIAN LIMITATION ACT, 1908.

ACT NO. IX OF 1908.

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Bom	148		4		217		212
	250		176		293		691
	275		220		297		535
	356		719		316	8	691
	673		121		414		380
3 Bom	174	18	238		459		698
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	221		684		5 2		232
	223		15		546		691
	312		217	8 Bom	1		513
	415		537		17	305	341
	433		690		39	177	192
4 Bom	21	273	274		234		378
	97		393		257		690
	515		2		260		61
	590		185		377	8	691
5 Bom	22		641		426	378	542
	25		339		529		158
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	29	159	694		561	101 14	394
	68	541	542		602		674
	89		181	9 Bom	1		296
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	206		691		86		281
	246		715		111	378	542
	322		611		244		13
	437		585		275		680
	463		483		280		477
	554		348		373		2
	653		4		419		613
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	256	581		340	716
	318	338		430	499
	387	563		500	703B
	401	506		606	406
	551	117		612	16 645
	586	181		640	274
	614	184		660	378
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19 Dom	41	498 509 611		7	191 707 708
	48	6,9		733	612
	140	563 564		783	437 508
	165	309 312		80	94
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	3 0	22		893	583
	35	360	23 Dom	1	611
	523	422		35	717
	620	580 622		80	518
	663	197 704		137	531
	775	360		177	177
809	585 586 592	246		246	578 579
	623 624	783		783	472 583 612
	477	307		307	315
20 Dom	8	414		414	659 664
	15	442		442	127
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	76	513		513	71
	109	525		525	337
	133	531		531	148 151
	175	544		544	160
	179	512		512	701
	270	602		602	612
	380	614		614	559 561
	383	614		614	692
	408	69		69	69
	508	118 506		725	500 589
	511	9 169A	24 Dom	23	106
	513	577		260	491
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	801	620A		435	288
21 Dom	110	683		493	195 197
	122	491 585		504	583
	159	184		619	195
	201	611	25 Dom	26	491
	226	533		78	422
	325	715		82	337
	331	491 493		275	580
	376	674		337	281 28
	392	223		358	580
	394	241 613 621A		362	533 612 620
	509	51		387	254
	552	55		556	465 508
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	646	614		586	130
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	107	561 563 567		644	31
	225	535 620		699	
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	410	601 612 625		515	458
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	442	584 6 5	35 Bom	49	109
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	56	177 31		139	148
	661	45		182	643
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	750	374 436		383	178
	782	38 176		393	680
27 Bom	1	393 710		438	616
	43	612 613 616		452	581 715
	330	22	36 Bom	111	515
	363	565 610		135	566 619
	373	561 565		146	561 567
	500	561 565 566		214	110 618
	515	621A		268	34
	560	421		325	288
	614	492		373	580
	622	717		498	101
28 Bom	1	471		638	715
	11	212	37 Bom	42	711
	87	614		84	334
	94	495 496		158	429
	215	337		317	715
	235	51 151		3 6	178
	248	03		393	4 315
	262	181		447	110 618
	416	717		513	491 49
	601	339		538	374 436
29 Bom	68	101 142		559	714 715
	219	154		656	465 467
	267	109	38 Bom	32	692
	300	620		47	191 715
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30 Bom	218	356		94	93 332
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31 Bom	1	420 501		227	27 612
	33	71		344	19
	50	721		449	421 532
	80	495		613	70
	163	712		653	147
	222	110		656	147
	303	667	39 Bom	20	707
	418	109		335	610
	630	4		358	374
32 Bom	1	403 691		494	288
	7	495		572	106
	14	23		729	212
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		467			162
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		470			637
		471			721
		472			24
		473			707
		474			15
		475			613
		476			288
		477			420
		478			126
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..	329	420, 591	..	239	.. 648
..	403	659, 675	..	259	.. 70
..	470	.. 294	..	898	.. 296
..	491	.. 279	41 Cal.	271	.. 514, 516
..	564	.. 473	..	654	.. 553
..	612	.. 217	..	819	.. 663
..	672	483, 691	..	1125	.. 4
..	711	.. 429	42 Cal.	35	.. 133, 689
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..	811	.. 281	..	85	6, 306, 317, 350
..	874	.. 703	..	244	.. 523
..	941	26, 27, 548	..	294	.. 692
..	1020	.. 686	..	350	.. 327
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..	298	410, 411, 550	..	1068	.. 507
..	346	.. 473	43 Cal.	34	.. 246, 546
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..	519	.. 216	..	211	.. 190
..	551	.. 420	..	248	410, 415, 550
..	683	487, 489	..	441	.. 215
..	728	.. 153	..	660	.. 102, 156
..	813	.. 200	..	707	.. 105, 560
..	851	.. 339	..	779	.. 511
..	924	.. 151	..	903	.. 724
..	961	612, 620	..	973	.. 643
..	996	.. 462	44 Cal.	1	.. 93, 415
..	1047	.. 711	..	16	.. 309, 310
..	1065	.. 219	..	379	.. 514
36 Cal.	141	307, 318	..	412	.. 511
..	394	101, 393	..	425	.. 243, 616
..	543	.. 724	..	567	.. 195, 197
..	609	.. 404	..	759	.. 465,
..	654	170, 669	..	858	11, 601
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	285	213		518	601 612 622
	302	597		580	715
	354	494		626	158
	409	217		647	190 203
	496	101 139 140		651	69
	565	443		654	483
	594	703B 712		664	620A
	642	108		813	75
	6 2	316 320	30 Cal	20	290
	844	177 195 364		76	714
6 Cal	51	190		142	672
	204	1 7 190		369	107
	241	366		407	159 694 719
	254	446		433	420 605
	285	589		440	305
	324	669		532	158
	326	430 662		609	686 691
	334	185		687	354
	400	511 613		699	177
	564	6 253 313 606		761	709 714 715 716
	593	234		790	41
	598	660		8 2	296
	653	302		9 9	724
	715	409 416		990	420 591
	888	713		1033	102
27 Cal	9 5	55		1077	233
	11	432	31 Cal	75	22
	5	601		83	393
	156	583		111	421
	180	378		150	659 660
	185	569		195	177
	205	468		228	277
	210	7 1 721		297	392 393
	221	600		385	281
	242	491 591		397	612 613
	285	7 6		503	238
	376	22		519	6 7
	540	216		647	259 605
	709	715		681	573 578
	762	483		745	553
	814	2		970	533 620
	827	465		1011	716
	943	612		1043	181
28 Cal	37	1	32 Cal	6	78 509 526
	86	26 27 337 340		118	153 462
	113	699		129	77
	238	151		165	589
	393	380		296	281 614
	427	29		459	307 318
	452	302		473	420
	465	95		527	378
29 Cal	25	279		537	74
	36	281 654 655		582	215
	54	699		716	290
	167	654 655		719	410
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	613	178	716	38 Cal	784		345
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	1079		712		453		539
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	551		420		248	410	415
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	813		200		707	105	560
	851		339		779		511
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	961	612	620		973		643
	996		462	44 Cal	1	93	415
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36 Cal	141	307	318		412		511
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	285	213		518	601 612 622
	302	597		580	715
	354	494		626	158
	409	217		647	190 203
	496	140		651	692
	565	443		654	483
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	642	108		813	75
	672	316 320	30 Cal	20	290
	844	177 195 361		76	714
26 Cal	51	190		142	672
	204	1 7 190		369	107
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	254	416		433	420 605
	285	589		440	305
	324	669		532	158
	326	430 662		609	686 691
	334	185		687	354
	460	511 613		699	177
	564	6 253 313 606		761	709 714 715 716
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	180	378		150	659 660
	185	569		195	177
	205	468		228	277
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	221	600		385	281
	242	491 591		397	612 613
	285	716		503	238
	376	2		519	627
	540	216		647	259 605
	709	715		681	573 578
	762	483		745	553
	814	22		970	533 620
	827	465		1011	716
	943	612		1043	181
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	86	26 27 337 340		118	153 462
	113	699		129	77
	238	151		165	589
	393	380		296	281 614
	427	29		459	307 318
	452	302		473	420
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29 Cal	25	279		537	274
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"	203 350	"	354	.. 715
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"	106	..	144	"	535	..	574
"	330	..	369. 378	"	575	..	713
"	460	..	306	"	621	..	664
36 C. L. J	140	..	578	"	876	..	601
"	228	..	177	9 C. W. N.	222	..	491
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38 C. L. J	207	..	539	"	679	..	488
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41 C. L. J	379	..	232	"	209	..	715
"	535	..	190	"	303	..	717
42 C. L. J	69	..	281	"	343	..	613
"	203	..	350	"	354	..	715
43 C. L. J.	45	..	150	"	630	..	600
"	387	..	539. 543	"	1024	..	433
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"	96	..	221	"	661	..	608
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"	543	..	605	"	528	..	512
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"	415	..	715	"	840	..	340
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ERRATA.

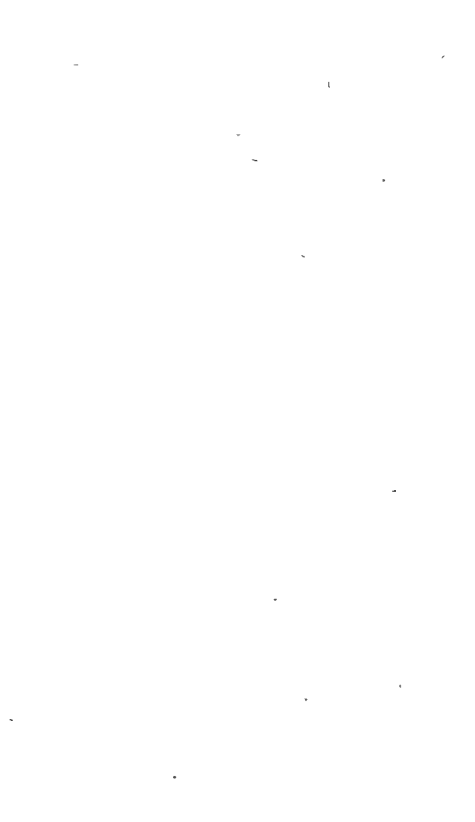
At p 428, 9th line from bottom, *for 50's read 406.*

„ 518, line 12, *for 29 All. read 28 All.*

ABBREVIATIONS EXPLAINED

(English Reports)

A C or App Cas	Law Reports Appeal Cases
Atk	Athens Reports
B A A1	Barnesall and Adolphus' Reports
B A C	Barnesall and Crosswell's Reports
B -g	Bingham's Reports
Burr	Burrow's Reports
Camp	Campbell's Reports
C B	Common Bench Reports
C M A R	Crompton Meeson and Roscoe's Reports
Ch or Ch D	Law Reports Chancery Division
DeG & J	DeGex and Jones Reports
DeG J A S	DeGex Jones and Smith's Reports
D & L	Dowling and Lowndes' Reports
East	East's Reports
F & B	Filis and Blackburn's Reports
Eq	Equity Reports
Ex or Exch	Law Reports Exchequer Division
Ex D	Law Reports Exchequer Division
H A C	Hurlstone and Colman's Reports
H L C	Law Reports House of Lords Cases
Ir L R	Irish Law Reports
L R Ch	Law Reports Chancery Division
L R C P	Law Reports Common Pleas
L R Eq	Law Reports Equity Cases
L R Ex	Law Reports Exchequer
L R Q B	Law Reports Queen's Bench
L T (N S)	Law Times (New Series)
Lev	Levinz's Reports
M & S	Maule and Selwyn's Reports
M & W	Meeson and Welsby's Reports
Moo P C	Moore's Privy Council Reports
Phillim	Phillimore's Reports
Q B	Adolphus and Ellis' Queen's Bench Reports.
Q B D	.. Law Reports, Queen's Bench Division
R & M	. Russel and Mylne's Reports
R R.	.. Revised Reports.
Stark.	.. Starkie's Reports
Taunt	.. Taunton's Reports
T R	.. Terms Reports



THE INDIAN LIMITATION ACT.

ACT No. IX OF 1908.

PASSED BY THE GOVERNOR-GENERAL OF INDIA
IN COUNCIL.

*(Received the assent of the Governor-General on the
7th August, 1908).*

**An Act to consolidate and amend the law for the Limitation
of Suits, and for other purposes.**

WHEREAS it is expedient to consolidate and amend the law relating to the limitation of suits, appeals and certain applications to Courts, and whereas it is also expedient to provide rules for acquiring by possession the ownership of easements and other property, It is hereby enacted as follows —

1. **Object.**—The object of the Limitation Act is to quiet long possession and extinguish stale demands—*Luchmee v Runjeet* 20 W. R 373, 377 (P C) The statute discourages litigation by burying in one common receptacle all the accumulations of past times which are unexplained and have now from lapse of time become inexplicable—Story's Conflict of Laws, 8th Edn, p 794 For this reason it has been termed a statute of repose, peace and justice—*Mangu v Kandhar*, 8 All 475. *Jag Lal v Har Narain*, 10 All 524 (529) *Tolson v Kaye*, (1822) 3 Brod & Bing 222 Statutes of limitation are definite rules of law giving to the population for whom those laws have been framed a guarantee that after the lapse of a certain period they may rest in peace and rely upon titles or other rights which they have acquired—*Ramjiwan v Chand Mal*, 10 All 587 (595) The object of the Act is not to create or define causes of action but simply to prescribe the period within which existing rights can be

enforced in Courts of law—*Suryamani v Kalihanta* 28 Cal 37 (46) *Jivi v Ramji* 3 Bom 207 *Binda v Kaunthia* 13 All 126 (142) The principle of the Act is not to enable suits to be brought within certain periods but to forbid them from being brought after periods each of which starts from some definite event—*Hurry Bhusan v Uperdra* 24 Cal 1 at p 7 (P C) The intention of the law of limitation is not to give a right where there is not one but to interpose a bar after a certain period to a suit to enforce an existing right—per Sir Richard Couch in *Hurrynath v Mothoor* 21 Cal 8 18 (P C) *Ram Narain v Barkandi* 12 O L J 77 A I R 1925 Oudh 400 See also *Kalicharan v Sukhoda* 20 C W N 58 *Khunnial v Gouind* 15 C W N 545 (P C) *Kumeda v Asutosh* 17 C W N 5 The Limitation Act merely prescribes a period for the institution of a suit and does not of itself create an obligation to sue where none existed—*Narayanan v Lakshmanan* 39 Mad 456 (458)

2 Construction—The Act of Limitation being an Act which takes away or restricts the right to take legal proceedings must when its language is ambiguous be construed strictly i.e. in favour of the right to proceed—*Umeshantlar v Chhotalal* 1 Bom 19 *New Fleming v Kesowji* 9 Bom 373 *Balvant v Secretary of State* 29 Bom 480 *Vethanna v Venkata Krishnayya* 41 Mad 18 33 M L J 35 41 Ind Cas 807 *Sundar v Salig Ram* 26 P R 1911 9 Ind Cas 300 (F B) *Deutsche Asiatische Bank v Hiralal* 47 Ind Cas 122 (Cal) This is also the law in England where it has been established by a balance of authority that statutes of limitation must be construed strictly against their operation No right or remedy is to be regarded as barred unless it is clearly shown to be shut out by the enactment—*Murlidhar v Mulu* 11 N L R 18 27 Ind Cas 935 Where the interpretation sought to be put upon the technical words of a Statute like the Limitation Act is arrived at by implication and inference the Court ought not to adopt a construction which has a restricting and penalising operation unless it is driven to do so by the irresistible force of language—*Abdul Karim v Islamunnissa* 38 All 339 (343) *Maung Tha v Ma Pyu* U B R (1918) 1st Qr 79 The provisions of this Act must not be extended to cases which are not strictly within the enactment whilst exceptions or exemptions from its operations are to be construed liberally—*Roddan v Morley* 1 DeG and J 1 (23) *Poorna v Sassoon* 25 Cal 496

The Act ought to receive such a construction as the language in its plain meaning imports—*Luchmee v Runjeet* 20 W R 375 377 (P C) It should not be so interpreted as to restrict rights unless it is clear that the Legislature intended that this should be done—*Jogeshur v Ghansham* 5 C W N 356 neither should it be so interpreted as to include cases not falling within the strict meaning of the words used—*In re Ramshankar* 3 C L R 440 *Parashram v Rakhma* 15 Bom 299

In certain Allahabad cases however Mahmood J is of opinion that

statutes of limitation must be construed strictly in favour of their operation : *e. g.* against the right to take legal proceedings—*Mangu v. Kandhai*, 8 All 475 (484). Statutes of limitation are statutes of repose, and they should be administered not in a variable manner but as strictly as possible in order to strengthen the repose at which they aim. The rule of limitation is not to be administered as a law system to be modified, varied or fluctuating according to the individual views or wishes of the Judge—*Ramjiuan v. Chard Mal*, 10 All 587 (595, 596). The statutes of limitation are intended to check tendency of dilatoriness, and such statutes must have strict operation. These statutes have been called statutes of repose, but the moment they are allowed to be slackly dealt with, they cease to be statutes of repose and frustrate the very object which they aim at—*Jag Lal v. Har Narain*, 10 All 524 (529).

The construction of Acts not in *pari materia* with the Limitation Act (*e. g.* the Court Fees Act) cannot be called in aid of the construction of the Limitation Act—*Daychand v. Hemchand*, 4 Bom 515, 526 (F B); *Assan v. Pathumma*, 22 Mad 494 (502).

The various articles dealing with a variety of particular cases should be so construed as to make them harmonious and consistent—*Sain Prasad v. Jogesh*, 31 Cal 681 (F B), 8 C W N 476, *Amme Raham v. Zia Ahmed*, 13 All 282, 284 (F B). The language of the third column of the first schedule should be so interpreted as to carry out the true intention of the legislature, that is to say, by dating the cause of action from a date when the remedy is available to the party—*Muthukorahkai v. Madar Ammal*, 43 Mad 185, 213 (F B).

3 Which Law applicable.—The law of limitation applicable to a suit or proceeding is the law in force at the date of institution of the suit or proceeding, unless there is a distinct provision to the contrary—*Lala Soni Ram v. Kanhaiya*, 35 All 227 (P C), *Begam Sultan v. Sarvi Begum*, 48 All 121, 23 A L J 977, A I R 1926 All 93, *Narendra v. Upendra*, 21 Ind Cas 113 (Cal), *Bisweswar v. Imamuddi*, 29 Ind Cas 833 (Cal), *Budhu v. Hafiz*, 18 C L J 274, *Gurupadapa v. Virabhadrapa*, 7 Bom 459, *Mohesh v. Busunt*, 6 Cal 340. Thus, a suit brought in 1904 on a mortgage executed in 1870 would be governed by the Limitation Act of 1877, not by the Act of 1859—*Lala Sani Ram v. Kanhaiya*, 35 All 227 (P C). If an *ex parte* decree is passed when the Act of 1877 is in force, and the application for setting aside the decree is made when the Act of 1908 comes into operation, the application would be governed by the latter Act—*Jia Bibi v. Ilahi*, 37 All 597, *Manohar v. Sadiqa*, 101 P R. 1916, *Zarbunnissa v. Ghulam Fatema*, 70 P L R 1911, 10 Ind Cas 823. If a sale takes place before 1908, and an application to set aside the sale (Art. 166) is made after the passing of the Limitation Act of 1908, it will be governed by the new Act—*Rai Aishori v. Mukunda*, 15 C W. N 965.

4 Effect of amendment or change —*Retrospective effect*.—The law of limitation is not always a law of procedure, that is to say, a purely adjective law, for amongst its other consequences it has the creation of rights by prescription and if those rights have vested in individuals under one law of limitation they cannot be divested by the introduction of a new law of limitation, or by an amendment in the law—*Gajanan v Waman*, 12 Bom L R 881, *Moro v Balaji*, 19 Bom 809 (814) The repeal of a Statute or other legislative enactment cannot, without express words or clear implication to that effect in the repealing Act, take away a right acquired under the repealed statute or other enactment while it was in force—*Sitaram v Khanderau*, 1 Bom 286, *Fazl Karim v Annada* 14 C W N 845 (cited under sec 6), *Sahib Dad v Rahmat*, 90 P R 1904 (F B) In other words a statute should not be so construed as to have a retrospective effect When the retrospective application of a statute of limitation would destroy vested rights or inflict such hardship or injustice as could not have been within the contemplation of the Legislature, the statute is not, any more than any other law, to be construed retrospectively—*Khushalbhai v Kabhai*, 6 Bom 26, *In re Ra'ansi Kalyani*, 2 Bom 148, *Behary v Gobardhan* 9 Cal 446, *Gopeswar v Jiban Chandra*, 41 Cal 1125 (S B), *Ichharam v Govind Ram*, 5 Bom 653, *Ram Ditta v Teklu*, 4 P R 1902 *Ramakrishna v Subbaraya*, 38 Mad 101, 24 M L J 54, 18 Ind Cas 64 *Rajah Pittapur v Gani Venkata*, 39 Mad 645, 29 M L J 1 30 Ind Cas 94 (F B) Where a section does not merely affect procedure but beginning with procedure it goes to the right such section cannot have a retrospective effect—*Falmabidi v Ganesh*, 31 Bom 630

Similarly, a suit or application which has been already barred by the old Act cannot be revived by the new one—*Jia Singh v Surya*, 31 All 495 *Khuntlal v Govinda*, 33 All 356 (P C), *Mohesh v Taruck*, 20 Cal 487 (P C) *Shumbhoona'h v Guruchurn*, 5 Cal 894, *Nursing v Hurryhur* 5 Cal 897 *Jagamba v Ram Chandra*, 31 Cal 314, *Vinayak v Balaji* 4 Bom 230, *Dharma v Govind*, 8 Bom 99, *Mahomed Mehdi v Sakinabai*, 37 Bom 393 *Appasami v Subramanya*, 12 Mad 26 (P C), *Teka v Sohnu* 39 P R 1901, *Khan v Hakim*, 97 P R 1905; *Raman v Chaphan* 23 M L J 753 *Somasundaram v Vaithilinga*, 40 Mad 846, 41 Ind Cas 546 So also, a judgment or decree which had become unenforceable by lapse of time before the passing of the present Act cannot be revived or made effective by any retrospective operation of this Act—*Sachindra v Maharaj Bahadur*, 49 Cal 203 (214), 26 C W N 859 P C

It should be noted in this connection that section 2 of the Limitation Act of 1877 contained a provision that "Nothing herein contained shall be deemed to affect any title acquired or to revive any right to sue barred under the Limitation Act, 1871 " But this clause has been omitted in the Act of 1908, in view of a similar provision existing in the General Clauses

Act. Section 6 of the General Clauses Act (N of 1897) provides that the repeal of any enactment "shall not revive any thing not in force or existing at the time of the repeal or affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed

5 Pending proceedings —Since the law of limitation applicable to a suit or proceeding is the law in force at the date of institution of the suit (see 35 All 227 above) and since a statute has no retrospective effect, it follows that any change in the law of limitation during the pendency of a suit does not affect the proceedings. A suit is governed by the provisions of the statute of limitation in force at the time of its institution and not by those of a subsequent statute coming into operation during its pendency—*Maula Baksh v Bhaba Sundari*, 19 C 1 J 187, *Ram Ditta v Tehlu*, 4 P R 1902

6 Applicability of sections and articles —The applicability of particular sections of the Limitation Act ought to be determined by the character of the thing sued for, and not by the status, race, character or religion of the parties—*Fallehsangji v Dessai*, 21 W R 178 (P C)

When there are two articles which may possibly govern a case, the one more general and the other more particular and specific, the latter ought to be applied—*Sharoop v Joggesur*, 26 Cal 564 (T B), *Mangu v Dolhin*, 25 Cal 692 (693, 699), *Municipal Board v Goodall* 26 All 482; *Madras Steam Navigation v Shalimar Works*, 42 Cal 85, *Narmadabai v Bhabanishankar*, 26 Bom 430, *Nagoba v Madholala*, 4 N L R 49, *Tofa Lal v Moynuddin*, 4 Pat 448 A I R 1925 Pat 765

But if two articles limiting the period for bringing the suit are wide enough to include the same cause of action, and neither of them can be said to apply more specifically than the other, that which keeps alive rather than that which bars the right to sue should generally, and apart from other equitable considerations be preferred—*Tofa Lal v Moynuddin*, (supra)

7 "Suits" —The Limitation Act is applicable to suits brought by the plaintiff, it does not apply to a right set up by the defendant in defence. A defendant will not be precluded from setting up a right by way of defence, even if he could not have done so as plaintiff by way of substantial claim—*Deodhari v Dayanand*, 35 Ind Cas 610 (Cal), *Sehram v Chhota Raja*, (1917) M W N 327, *Sri Krishan v Kashmire*, 20 C W N 959 (P C), *Akbar v Raghunandan*, 57 Ind Cas 348 (Lah), *Venkatachalapathi v Robert Fischer*, 30 Mad 444, *Lakshmi Dass v Rup Lal*, 30 Mad 169 (F B), *Rajagopalan v Subramania*, (1919) M W N 356; *Meherban v Raghunath*, 5 O L J 768, 49 Ind Cas 115, *Raisunnissa v. Zorawar*, 29 O C 118, 13 O L J 10, A I R 1926 Oudh 228, *Mahadev v. Sadashiv*, 45 Bom 45. But where a suit by the defendant would have been barred under sec 26 or 28, the defendant cannot set up his right by way of defence—*Mahadev v Sadashiv*, 45 Bom 45, 22 Bom L R 1082, 59 Ind. Cas 118

8. Certain applications —It should be noticed that this Act does not provide for *all* kinds of applications to Court, but is limited to *certain* applications mentioned in the 1st schedule. The following applications are *not* covered by this Act —

(1) An application for a certificate to collect the debts due to the estate of a deceased person—*Janaki v Kesavalu*, 8 Mad 207, (2) an application for probate—*In re Ishan Chandra Roy*, 6 Cal 707, *Bai Manekbai v Manekji*, 7 Bom 213, *Gnanamuthu v Vana* 17 Mad 379. (3) an application for letters of administration—*Kashi Chundra v Gopikrishna*, 19 Cal 48 *Bai Manekbai v Manekji*, 7 Bom 213. (4) an application under the Religious Endowments Act, or an application for the appointment of new trustees—*Janaki v Kesavalu*, 8 Mad 207 (5) an application to a Court to exercise the functions of a ministerial character—*Kylasa v Ramasami*, 4 Mad 172, *Vithal v Vithoji*, 6 Bom 586, *Moolla Cassim v Moolla Abdul*, 8 L B R 422 (6) an application to a Court to do what the Court is bound to do and has no discretion to refuse to do—*Darbo v Kesho*, 9 All 364, *Balaji v Kushaba*, 30 Bom 415 *Madhabmoni v Lambert*, 37 Cal 796 *Moolla Cassim v Moolla Abdul*, 8 L B R 422, 35 Ind Cas 950 as for example, an application to a Court to pass judgment according to an award—*Iswardas v Dostbai*, 7 Bom 316, or an application for a certificate of sale by a purchaser of land at a Court sale—*Devidas v Pirjada*, 8 Bom 377, *Kylasa v Ramasami*, 4 Mad 172 See notes under Art 181

9 Criminal Proceedings —The Limitation Act does not apply to criminal proceedings unless it is made applicable to them by express provisions—*Queen v Ameeroddeen*, 15 W R 25 (Cr), *Queen v Nageshappa*, 20 Bom 543 (546), *Queen Empress v Ajudhia Singh*, 10 All 350, *In the matter of Kittu*, 11 Mad 332 Thus, an application for sanction under Sec 193 of the Crim P Code was not governed by any rule of limitation—*Queen-Empress v Ajudhia Singh*, 10 All 350, *Queen v Nageshappa*, 20 Bom. 543 Act XIII of 1859 (Workmen's Breach of Contract) being a penal enactment, the Limitation Act is no bar to a claim under Sec 2 of that Act to recover an advance made to a labourer—*In the matter of Kittu*, 11 Mad 332 Certain criminal appeals are specially provided for in Articles 150, 150A, 154, 155 and 157

PART I.

PRELIMINARY.

Short title extent and commencement 1 (1) This Act may be called the Indian Limitation Act, 1908

(2) It extends to the whole of British India; and

(3) This section and section 31 shall come into force at once
The rest of this Act shall come into force on the first day of January, 1909

20 British India —This Act applies to the Agent's Court at Aden which is included in the Bombay Presidency, and to non regulation Provinces and the scheduled Districts—*Q E v Cheria Raja*, 13 Mad 353 (360) This Act does not apply to Laccadive Islands—*Ahmed Raja v Assamma*, 49 Mad 419 93 Ind Cas 341, A I R 1926 Mad 657

Native States do not form part of British India and this Act is not intended to apply to them although many of those States have adopted this Act See also Note 13 under sec 2

Definitions 2 In this Act, unless there is anything repugnant in the subject or context,—

(1) "applicant" includes any person from or through whom an applicant derives his right to apply

(2) "bill of exchange" includes a hundi and a cheque

(3) "bond" includes any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is performed, or is not performed, as the case may be

(4) "defendant" includes any person from or through whom a defendant derives his liability to be sued

(5) "easement" includes a right not arising from contract, by which one person is entitled to remove and appropriate for his own profit any part of the soil belonging to another or anything growing in, attached to, or subsisting upon, the land of another

(6) "foreign country" means any country other than British India

(7) "good faith"; nothing shall be deemed to be done in good faith which is not done with due care and attention:

(8) "plaintiff" includes any person from or through whom a plaintiff derives his right to sue:

(9) "promissory note" means any instrument whereby the maker engages absolutely to pay a specified sum of money to another at a time therein limited, or on demand, or at sight:

(10) "suit" does not include an appeal or an application: and

(11) "trustee" does not include a benamidar, a mortgagee remaining in possession after the mortgage has been satisfied, or a wrong doer in possession without title.

'Includes'.—The use of this word shows that the definition is not exhaustive, but enumerative only. Where the definition is intended to be exhaustive, the word 'means' is used—*Empress v Ramanujappa*, 2 Mad 5 (7), *Bahadur v Purshotam*, 9 B H C R 99 (106)

10A 'Bond'.—The definition is the same as that given in Sec 2 (5) (a) of the Indian Stamp Act II of 1899

Where 40 maunds of wheat were advanced to the defendants who agreed in writing to repay the same with interest in kind, held that the instrument was a bond within the meaning of this section, and not a mere agreement—*Wadhwa v Karim Bakhsh*, 6 Lah 276, 86 Ind Cas 844, A I R 1925 Lah 415

11. Defendant, 'from or through'.—Adverse possession of a defendant may be added to the previous adverse possession of the widow by whom the defendant was adopted, as the defendant derived his liability to be sued from the widow and thus brought himself within the definition of a "defendant" as provided by this section—*Padajirav v Ramrat*, 13 Bom 160 (165). So also, adverse possession by the defendant of the office of *archaka* may be supplemented by the previous adverse possession of his predecessor in office—*Krishnaswami v Veeraswami*, 36 M L J. 93, 49 Ind Cas 393. Adverse possession of the defendant may be supplemented by the previous adverse possession of the judgment-debtor from whom the defendant purchased, and may be pleaded in a suit by the auction purchaser under sec 331 of the C P C of 1882 (rr. 99 and 103, Order XXI of the Code of 1908)—*Nandev v. Ramchandra*, 18 Bom 37. A son in a Mitakshara family acquires an interest by devolution, as soon as he is born, in the property vested in his father and other members of the family, and thus he derives his liability to be sued from or through his father and those members and to be impleaded as a defendant in a suit against the family property—*Hari Prasad v. Sourendra*, 1 Pat. 506

(521) 3 P L T 709 A I R 19 Pat 450 A purchaser at an auction sale acquires the right title and interest of the judgment debtor and in virtue of that is put in possession by reason of which he becomes liable to be sued by the true owner He therefore derives such liability within the contemplation of this section from or through the judgment debtor — *Ali Sakeb v. Kaji Ahmad* 16 Bom 197

A *char* which was found to be reformation *in situ* of the plaintiff's land was occupied for some years by Government It was then claimed by the defendants as their property and Government made over possession to them On plaintiff's suing to recover possession the defendants pleaded limitation and to make out their plea claimed to tack on to their own occupation the period of Government's possession Held that the defendants did not derive liability to be sued from or through the Government but on the other hand they had claimed against the Government and had recovered the land from the Government they therefore could not tack the period of Government's possession to their own — *Basan a Kumar v. Secretary of State* 44 Cal 858 874 (P C) 21 C W N 642 15 A L J. 378 17 Bom L R 480 3- W L J 505

12 Easement — The definition of easement given in this section shall not apply to those places where the Easements Act applies viz — Madras the Central Provinces Coorg Bombay the N W Provinces and Oudh See Easements Act (V of 188) Sec 3 In those places the following definition as given in Sec 4 of the Easements Act will be adopted — An easement is a right which the owner or occupier of certain land possesses as such for the beneficial enjoyment of that land to do and continue to do something or to prevent and continue to prevent something being done in or upon or in respect of certain other land not his own

See notes under Sec 26

13 Foreign country — Aden the Andaman and Nicobar Islands Ajmere and Marwara in Rajputana are declared by Acts XIV and XV of 1874 to be parts of British India So also the Cantonment of Wadhwan in Kathiawar — *Triccampnachand v B B & C I Ry Co*, 9 Bom 244

The Native States are outside British India So is the territory of Mayurbhanj — *Empress v Keshub* 8 Cal 985 (F B) so is the British Cantonment of Secunderabad — *Hossain Ali v Abid Ali* 21 Cal 177 as also the Tributary Mehals of Orissa — *Ratan Mahanti v Khaloo* 29 Cal 400 and the Colony of Mauritius — *Kasim v Isuf* 29 Cal 509 (516) so also the Laccadive Islands — *Ahmed Koya v Aisamma* 49 Mad 419 93 Ind Cas 341 A I R 1926 Mad 657

Good Faith — The definition is almost the same as that given in sec 32 of the Indian Penal Code

14 Plaintiff — from or through — A *stanom* according to the

tomary law of Malabar is descendible from one *stanom* holder to another in a peculiar line of succession and each successive holder is in the same position as an ordinary heir succeeding on intestacy. *Stanom* holders therefore derive their title to sue *from or through* their immediate predecessors within the meaning of this clause—*Rajah of Palghat v Rama* 1881 41 Mad 4 33 M L J 26 42 Ind Cas 22

But a *ghatwal* does not claim through a previous *ghatwal* within the meaning of this clause even though the latter may be the father of the former—*Prosanna Kistiar v Srikanth* 40 Cal 173 17 C W N 139 16 Ind Cas 365

A reversioner claiming an estate under the Hindu law does not claim from or through the widow in whom the estate vested at the death of the last male holder—*Lambasiva v Ragasa* 13 Mad 512 Therefore adverse possession against the widow does not necessarily bar the reversioners also See this subject discussed under Article 141

A trustee of an endowment derives his title *from or through* the trustee preceeding him—*Gnanasambhandha v Velu Pandaras* 23 Mad 271 (280 281) But one of several joint tenants does not claim *from or through* a deceased joint tenant because when one of the joint tenants dies no one claims anything under him as there is no transmission of interest—*Richardson v Yong* 6 L R 6 Ch 478 cited in *Bhogilal v Amrita Lal* 17 Bom 173 (178) And where there are several reversioners entitled successively under the Hindu Law to an estate held by a Hindu widow no one of them claims through or derives his title from another but each derives title from the last full owner—*Bhagwanji v Sukhi* 22 All 33 (I B) If therefore the right of the nearest reversioner to contest an alienation by the widow is allowed to be barred by limitation as against him it will not bar the similar rights of the remoter reversioners See notes under Article 125

15 Promissory Note —Compare this definition with that given in Sec 4 of the Negotiable Instruments Act XXVI of 1881 A promissory note is an instrument in writing (not being a banknote or a currency note) containing an unconditional undertaking signed by the maker to pay a certain sum of money only to or to the order of a certain person or to the bearer of the instrument

16 Suit —A suit must begin with a plaint Therefore a proceeding under Sec 144 of the Civil P Code 1882 (Sec 47 of the Code of 1908) is not a suit—*Venkatachandrappa v Venkatarama* 22 Mad 256 (258) The word suit in this Act does not include an appeal or an application Thus it does not include an appeal in a divorce suit—*A v B* 22 Bom 612 Nor does it include an application under the Indian Companies Act Sec 114—*Connell v Himalaya Bank* 18 All 12

Trustee —See notes under sec 10

PART II

LIMITATION OF SUITS APPEALS AND APPLICATIONS

- 3 Subject to the provisions contained in sections 4 to 25 (inclusive), every suit instituted, appeal preferred and application made after the period of limitation prescribed therefor by the first schedule shall be dismissed,

Dismissal of suits
etc instituted etc
after period of limi-
tation

although limitation has not been set up as a defence

Explanation —A suit is instituted in ordinary cases when the plaint is presented to the proper officer in the case of a pauper, when his application for leave to sue as a pauper is made, and, in the case of a claim against a company which is being wound up by the Court when the claimant first sends in his claim to the official liquidator

16A Special or local laws —By section 29 (2) as amended by the Limitation Amendment Act of 1922 this section has been made applicable to special or local laws

17 Government —Even the Government is not entitled to an exemption from the provisions of the Limitation Act—*Appaya v Collector*, 4 Mad 155

18 Custom —No custom will be allowed to override the positive prescriptions of the Limitation Act—*Mohanlal v Amrattal* 3 Bom 174

19 Agreement of parties —The parties cannot by consent or agreement extend or alter the period of limitation—*Aristo Komul v Hurce Sirdar* 13 W R 44 (F B) *Lalla Ram Sahoy v Dodray* 20 W R 395 *Nobam v Dhon* 5 Cal 820 *Baroda Spinning and Weaving Co v Satya Narayan Marine and Fire Insurance Co* 38 Bom 344 *Kietra Mohan v Mohim* 18 Ind Cas 595 *Midnapur Zemindary v Deputy Commissioner* 3 P L J 132 44 Ind Cas 370 so also the parties cannot waive the statute or contract themselves out of the law of limitation in this country For it is well settled that there can be no estoppel against an Act of the Legislature An agreement by a person against whom a cause of action has arisen that he would not take advantage of the law of limitation is ineffective—*Sitharama v Krishnasami* 38 Mad 374 (381) 25 M L J 264 21 Ind Cas 24 This section places it beyond the power of the Judge, as well as beyond the power of the defendant to ignore or waive the of limitation—*Manghu v Kandhar* 8 All 475 *Samuel v Improver*

Trust, 26 O C 324 73 Ind Cas 127 A covenant not to raise the plea of limitation in case a suit has to be filed, is inoperative and invalid, since its effect is to defeat the provisions of this Act, and as such falls within section 23 of the Contract Act—*Ramamurthi v Gopayya* 40 Mad 701 *Sitharama v Krishnasami*, 38 Mad 374 Such a covenant will not prevent the Court from interfering and dismissing the suit—*Chaturbhuj v Muhammad Habib*, 54 Ind Cas 36 (Pat)

So also, the parties cannot agree to postpone the period of limitation—*Ramamurthi v Gopayya*, 40 Mad 701

20 Consent of parties —The consent of parties cannot give a Court jurisdiction to hear an appeal when the same has been presented beyond the time prescribed by the Limitation Act—*Debi v Mulku* 1894 A W N 79

21 Onus of proof —This section compels the Court to dismiss the suit, if it is time barred, although the defence of limitation has not been set up and the plaintiff must show that his suit has been instituted within the period of limitation, or that there are circumstances which take his case out of the ordinary period of limitation—*Mahomed Arsad v Eakoob*, 24 W R 181 The plaintiff must on his own allegations be able to show that his suit is within time he cannot be allowed to adopt any allegations of the defendant in order to show that his claim is not barred—*Mansa Ram v Behari* 6 P R 1912 But if the plaintiff proves his case and the defendant sets up the defence of limitation the defendant must plead it and show that the claim is barred—*Radha Prasad v Bhajan*, 7 All 477 (680) If the defendant asserts that a shorter period applies, then the burden lies on the defendant to prove the circumstances which bring the suit within the shorter period—*Mohan Singh v Henry Conder*, 7 Bom 478 If when the plaintiff proves his case (in a suit to recover money on a bond) it appears from the facts that the debt accrued at a date earlier than the period of limitation, and the defendant has set up the plea of limitation in that case the defendant will be entitled to judgment—*Radha Prasad v Bhajan*, (supra)

So also, this section compels the Appellate Court to dismiss a time-barred appeal although the respondent has not taken the objection; and it lies upon the appellant to prove affirmatively that the appeal has been presented in proper time—*Ramey v Broughton*, 10 Cal 658

22 Suit instituted —A suit should be taken as instituted on the day on which the plaint is presented it does not matter, if it be not accepted on that day, therefore where a plaint is presented within the period of limitation with insufficient Court fee, and time is given by the Court to make good the deficiency, the suit is not barred by limitation if the deficiency is supplied within the period fixed by the Court, though after the limitation period had expired For the purposes of limitation, the date of presentation of the plaint and not the date on which the requisite Court-

fees are subsequently put in, should be deemed to be the date of institution of a suit—*Raj Ashtori v Madan Mohan* 31 Cal 75 *Surendra Kumar v Anuja* 27 Cal 814, *Muri Mohun v Naimuddin* 20 Cal 41 *Moti v Chhatri*, 19 Cal 740, *Dhondiram v Taba*, 27 Bom 330 *Ram Dayal v Sher Singh*, 45 All 519, 21 A L J 357, A I R 1923 All 538 *Gavaranga v Bolokrishna*, 32 Mad 305 F B (overruling *Lenkataramayya v Krishnayya* 20 Mad 319), *Assau v Pathumma*, 22 Mad 494, *Hari v Akbar* 29 All 749 (F. B.), *Gaya Loan Office Ltd v Awadh Behari* 1 P L J 420, *Tara Singh v Muhammad*, 74 P R 1903, *Saif Ali v Farul Mehdi*, 123 P R 1907; *Jhanda Khan v Bahadur Ali*, 3 P R 1893

Compare sec 149 of the C P Code (1908) and sec 28 of the Court Fees Act

[But it has been held in certain other Allahabad cases that a suit can not be said to be instituted by the presentation of a plaint which bears insufficient Court fee, and the date on which it is re presented with proper stamps is the date of institution of the suit, therefore, if at the time when the deficiency in Court fee stamps is made good the period of limitation has expired the suit must be dismissed as barred—*Chhatarpal v Jagram*, 27 All 411, *Ram Takal v Dhubri*, 28 All 310, *Durga v Bisheshar*, 24 All 218, *Jaini v Bachu*, 15 All 65 at p 70 (F B) Even if the Judge fixes a time for the payment of the deficient Court fee, it must be a time within the period of limitation—*Jaini v Bachu*, 15 All 65 (F B) *Muhammed Ahmed v Muhammad Serajuddin*, 23 All 423 But these rulings have been disapproved of in 29 All 749 (F B)]

Similarly, when a plaint is returned and ordered to be amended within a time fixed by the Court, it is the date of the original presentation of the plaint, and not the date of the subsequent presentation after amendment that is deemed to be the date of institution of the suit—*Durgagir v Kollu*, 10 Ind Cas 781, *Patel Masfial v Bai Parson* 19 Bom 320, *Sheo Parlab v Gholam*, 2 All 875, *Ram Lal v Harrison* 2 All 832, *Jagannath v Lalman*, 1 All 260

If a plaint has been insufficiently stamped at its presentation, and the deficiency is supplied after the expiration of the period of limitation, and after expiry of the time fixed by the Court for the supply of the deficient stamps it will be liable to rejection and the suit will be considered barred—*Brahmomoys v Andi Si* 27 Cal 376

Where a wholly unstamped (and not merely insufficiently stamped) plaint was filed on the last day of limitation and the Court accepted it and ordered the plaintiff to file stamps the next day, which the plaintiff did held that the suit was time barred the plaint being considered as presented on the day on which the stamps were put in—*Parlab Singh v Kishan Dyal*, 1890 P R 130

Where a suit was by two plaintiffs, but the plaint being signed by one alone it was returned for the signature of the other, and the same

was re presented after the period of limitation allowed for the suit, held that the suit was barred—*Vellappa v Subrahmanian* 26 M L J 494 23 Ind Cas 431

Where a plaint presented within time was returned to the plaintiff after issue of summonses the defendants not having been found for being re presented when the whereabouts of the defendants could be found the suit would be in time though when the plaint was re presented the point of limitation had expired—*Torobas v Pir Bakhs* 22 P R 1887

Where a plaint presented in time to the proper Court was returned by that Court to be presented to the Court deputed to try the suit and was re-presented to the Court deputed at a time when the period prescribed had already expired the suit should not be dismissed The principle is that when a plaint is presented to the proper Court which makes it over for disposal to a subordinate Court the date of the suit is the date of original presentation and the fact that the Court improperly returned the plaint to the plaintiff for presentation to the subordinate Court instead of itself forwarding it direct to such Court does not affect the question of limitation—*Seth Thandi Ram v Mahdia* 7 P R 1895

Proper presentation—The plaint must be presented to an officer authorised to receive it otherwise there is no proper presentation and the suit is not instituted—*Raj Chunder v Googul Gope* 18 W R 172 Thus where a plaint was presented to a *karkun* left in charge of the Court during vacation it was held that such presentation was invalid—*Nandavallabh v Alibhai* 6 B H C R A C 254 A despatch by post is not presentation to the proper officer of the Court but if such a plaint is accepted and the party afterwards appears and takes out the necessary processes under the Court's orders within the period of limitation it may be held that the institution was not bad—*Sankaranarayana v Kunjappa* 8 Mad 411 (413)

Suit against minor—A suit against a minor is instituted when the plaint is filed not when a guardian *ad litem* for him is appointed—*Khem Karan v Har Dyal* 4 All 37 *Imami v Saddam* 18 P R 1901

23 *Appeal preferred*—In cases of appeals too a conflict of opinion exists as to whether an appeal should be treated as preferred on the day on which it is first presented or on the subsequent date on which it is presented after putting in of proper stamps According to some cases, the date of the original presentation of the memorandum of appeal and not the date on which it is re presented after supply of deficit stamps is deemed to be the date of filing of the appeal—*Patcha Saheb v Sub Collector*, 15 Mad 78 while in *Yakubunnisa v Kishore Mohan* 19 Cal 747 and *Balkaran v Govind* 12 All 129 (F B) it has been held that a memorandum of appeal not properly stamped when presented cannot be treated as having been preferred within the meaning of this section of the Limitation Act The Patna High Court likewise holds that if an appellant deliberately without any excusable ground and to suit his own convenience pays on 15

appeal insufficient Court fee the Court is not bound to accept the appeal and give the appellant time to make good the deficiency, even assuming that the Court has power to receive such appeal and allow time for the deficiency to be made good it would be exercising its discretion in an unreasonable manner if it were to do so—*Ram Sahay v. Lachmi Narayan* 3 P. L. J. 74

Proper presentation of appeal—An appeal is said to be preferred when it is presented in accordance with sec. 541 of the C. P. Code 1882 (O. XXI r. 1 of the Code of 1908) i.e. by a proper person to the proper Court—*Akshoy Kumar v. Chunder Mohun* 16 Cal. 250

Presentation of an appeal without a copy of the decree appealed from is not a proper filing of the appeal—*Masum v. Madan* 1911 P. W. R. 8 *Balkaran v. Gorind Nath* 12 All. 129 (F. B.) *Chamila v. Amir Khan* 16 All. 77 *Akbar Ali v. Ram Chand* 53 P. R. 1887 *Nihal v. Ishwar* 147 P. R. 1879 *C. v. C.* 72 P. R. 1903 *Bhag Singh v. Jhanda Singh* 7 P. R. 1879 But a copy of the decree of the first Court is not required to be filed with the memorandum of a second appeal—*Pirathi Singh v. Venkataramangyan* 4 Mad. 419 (F. B.) *Chunilal v. Dakhyabhai* 32 Bom. 14 (F. B.)

If a memorandum of appeal is presented to the District Judge at his house after Court hours on the last day of limitation the Judge has jurisdiction to accept it although he is not bound to do so—*Thakur Din Ram v. Hari Das* 34 All. 482 (F. B.)

Appeal by prisoner—Presentation of the petition of appeal by a prisoner in jail to the officer in charge of the jail is equivalent to presentation to the Court—*Queen v. Lingaya* 9 Mad. 258

24. *Application made*—For the purposes of limitation applications may be made at any time in the day notwithstanding the rules of the Court prescribing certain hours for the receipt of petitions and hearing of motions—*Desputty v. Doolar Roy* 1 C. L. R. 291

An application made to the High Court (original side) of Bombay is deemed to be made for the purposes of limitation when the notice of motion is first filed in the proper office of the Court and not when the motion is made—*Venkapaiya v. Nazerali* 47 Bom. 764 (772)

When an application for execution is defective in certain particulars and a supplemental application furnishing such particulars is put in the two may be considered as one application put in on the date of the first—*MacGregor v. Tarins Churn* 14 Cal. 124 But it has been held by the Allahabad High Court that an *insufficiently stamped* application for review will be considered as made for the purposes of limitation only on the day the deficiency in stamp is supplied—*Minro v. Cawnpore Municipal Board* 12 All. 57 Compare the cases cited at p. 13 ante as regards insufficiently stamped *plaints*

The application must be made to the *proper* officer, otherwise there is no proper making of application. The presentation of an application for review to the *Munsarim* of the District Court instead of to the Judge was held to be improper—*Munro v Cawnpore Municipal Board*, 12 All 57

25 Shall be dismissed" — "Reasons of public policy having dictated the enactment of the Law of Limitation, the Indian Legislature has expressly declared that, whether the defence of limitation be pleaded or not the Courts whether of first instance or of appeal are bound to give effect to such law. The bar of limitation cannot be waived, and suits and other proceedings *must* be dismissed if brought after the prescribed periods of limitation"—U N Mitra's Limitation (5th Edn), p 38 "A Law of Limitation and prescription may appear to operate harshly or unjustly in particular cases but where such a law has been adopted by the State for reasons which justify the rule in the majority of cases, it must be applied with stringency, and no individual case to which these reasons are inapplicable can be excepted from its operation. The general good of the community requires that even a hard case should not be allowed to disturb the law. The rule must be enforced even at the risk of hardship to a particular party. The Judge cannot on equitable grounds enlarge the time allowed by the law, or postpone its operation, or introduce exceptions not recognized by it"—*Ibid*, p 248

It has been held in a Madras case that the obligation cast upon a Court to dismiss a suit exists only in cases where it is in a position to dismiss the *whols* suit. It does not exist, where the plaintiff's claim is partially admitted by the defendant—*Kandasamy v Annamalai*, 28 Mad 67. But the correctness of this decision may be doubted.

Time barred appeal presented before wrong Court—Where an appeal is filed in the wrong Court and is out of time, the Court is entitled to dismiss it, and not to return it for presentation to the proper Court in order that the latter may consider the question as to whether the time can be extended under Section 5—*Charandas v Amir Khan*, 48 Cal 110 at pp 117, 118 (P. C.), 25 C W N 289, 57 Ind Cas 606

25A Admitting time-barred appeal subject to objections.—The practice of admitting a time-barred appeal "subject to objections at the hearing" has been condemned by the Privy Council in *Arishnasami v Ramasami*, 41 Mad 412, 22 C W. N 481, 20 Bom L R 541 and should therefore cease. See also *Talendrayal v. Gunendrayal*, 31 C I J 1 *Abdul Kassem v Chaturbhuj* 6 P. L. J 444, *Chaturbhuj v Muhammad Habib*, 54 Ind Cas 36. In the above Privy Council case as well as in *Shrimant Sundarabai v Collector*, 43 Bom. 376 (P. C.) their Lordships of the Judicial Committee impressed on the Courts in India the urgent expediency of adopting a procedure which should secure at the stage of admission the final determination (after due notice to all parties) of any question of

limitation affecting the competency of an appeal. See also Note 70 under Section 5.

26 Limitation not pleaded by the defendant.—The provisions of this section are mandatory and are to be given effect to even though the point of limitation is not raised at all by the defendant or is raised at a late stage of the case e.g. in second appeal—*Balarani v Mangla* 34 Cal 941 (F B). See also *Deo Narain v Relb* 28 Cal 86. A Court is bound to take notice of a question of limitation not specifically raised in the written statement if on the facts in the plaint and those found it patently appears that the suit is barred—*Phodes v Padmanalha*, 17 M L T 18, 26 Ind Cas 460. *Isureswar v Sadashu* 27 Bom L R 1456 A I R 1926 Bom 51. Even the fact that the defendant has abandoned the plea of limitation in the lower Court does not relieve the Appellate Court of the duty of taking notice of the point of limitation *suo motu*—*Hukam v Shahab Din* 1918 P W R 14 44 Ind Cas 890. *Nehal Devi v Kishore Chand*, 97 P R 1910 8 Ind Cas 999. But where the suit is not on the face of it obviously barred by limitation the Appellate Court does not exercise a wise discretion in taking up the question of limitation on its own initiative—*Mg Jan v Mg Po Ha* 3 Rang 60 89 Ind Cas 56.

In England the statutes of limitation may be waived by the person entitled to the benefit thereof therefore if limitation is not pleaded by the defendant the Court will not of itself take notice of the defence. But this rule applies only to those cases where limitation merely bars the remedy without extinguishing the very right itself and not to cases where the very right itself (and not merely the remedy) is barred. See Banning on Limitation, 3rd Edition page 10. See also *Sitharama v Arishnatuamy*, 38 Mad 374 at p 380.

27 Plea when can be taken.—In the Original Court, if the plea of limitation is taken before the issues are fixed, it must, of course be entertained and decided. If it is taken by the defendant at a later stage and can be decided on the existing issues and on the record as it stands there, the Court is bound to take note of it and decide it. This rule holds good whether the plea has been actually taken or not if the matter has in any way come to the notice of the Court. But if after the issues in the case have been fixed and the case has proceeded to some length the defendant raises the question of limitation and the Court finds that in order to decide that question fresh issues of fact have to be gone into and additional evidence taken then the Court has the option of refusing to entertain the plea. When a case has passed out of the Court of first instance and is before a Court of appeal, the rule remains the same and an appellate Court is justified in refusing to entertain a plea of limitation which was not taken in the first Court nor in the grounds of appeal in the Appellate Court but is urged for the first time in argument in the latter Court, the plea for its proper decision involves further inquiry into facts—5

Muhammiad v. Piara, 84 P R 1911, 13 Ind Cas 792 If the defendant deliberately abandons the plea of limitation in the Court of first instance, he cannot be allowed to raise the question in appeal, if the facts found do not enable the Appellate Court to decide it—*Seshachala v. Varada*, 25 Mad 55 60 *Rangajya v. Narasimha*, 19 Mad 416 But an appellate Court can take cognizance of the question of limitation for the first time, if upon the facts already on record the suit is barred, and no question of fact has to be inquired into so as to enable the Court to decide the point of limitation—*Gulabmal v. Shuwal* 259 P L R 1914, 25 Ind Cas 354 If the point of limitation arises upon the facts of the case, and does not stand in need of being developed by evidence, it must be heard and determined by the Appellate Court though it does not appear on the pleadings or in the grounds of appeal—*Deo Narain v. Webb*, 28 Cal 86, *Bechi v. Ashanullah* 12 All 461 (F B) *Nadhu Mandal v. Karlik Mandal*, 9 C W N 56 *Raghunath v. Pareshram* 9 Cal 635 *Ganeshdas v. Nimbi*, 8 N L R 174 17 Ind Cas 638 But if it was not taken in the grounds of appeal the party urging it cannot argue it except on obtaining the permission of the Court under Sec 542 of the Code of Civil Procedure 1882 (O XLI r 2 of the Code of 1908) and the Appellate Court should give the permission where the point arises on the face of the plaint and no question of fact has to be enquired into to enable the Court to dispose of it—*Balaram v. Mangli* 34 Cal 941 (F B) *Ahmed Ali v. Haris* 15 All 123 (F B) *Gulab v. Shuwal* 259 P L R 1914

Where the defendant makes a general plea of limitation (viz that the suit is barred by the 12 years rule) the Appellate Court is not competent to dismiss the suit on the special plea that the suit is barred under Art 3 Sch III of the Bengal Tenancy Act, when such latter plea is raised for the first time in the Court of Appeal without raising an issue in the lower Court and allowing the plaintiff to adduce evidence on it—*Ardar Nath v. Mohesh Chandra* 28 C L J 216, 46 Ind Cas 787.

Where a plea of limitation was not taken in either of the Courts below, it cannot be entertained for the first time in second appeal where such entertainment would involve the taking of additional evidence—*Atmaram v. Sardar Kuar*, 1884 A W N 327, *Pirsab v. Gurappa*, 38 Bom 227, 16 Bom L R 111, 24 Ind Cas 716, or where the determination of the question would involve a fresh investigation of facts—*Bhadur v. Manohar*, 4 P. L J 643 52 Ind Cas 125, *Skwapa v. Dod Nagaya*, 11 Bom 114, *Khub Lal v. Jugdish Pershad*, 1 Pat 23, 3 P L T 795, A I R 1922 Pat 393 But it can be raised for the first time in second appeal if it can be determined on the pleading and does not depend upon any question of fact regarding which the other party might have adduced evidence—*Peruma v. Rama*, 28 M L J 115 28 Ind Cas 378, see also *Narasingha v. Prakashman*, 46 Cal 455, 22 C W N 994 47 Ind Cas 25 But in *Dattu v. Kasai*, 8 Bom 535 the second Appellate Court refused to enter

tain the plea of limitation raised for the first time in second appeal even though the point appeared on the face of the plaint. A second Appellate Court cannot entertain the plea that the first appeal to the lower Appellate Court was time-barred when it was presented if the plea has not been set forth in the memorandum of second appeal—*Ahmed Ali v Waris*, 15 All 123 (F B) *Ram Krishna v Dipa* 13 All 580

A point of limitation cannot be raised for the first time in the High Court in revision when it involves a mixed question of law and fact—*Na san v Ramachandra* 27 M L J 728 27 Ind Cas 116. Even the High Court (in a second appeal) cannot of its own accord go into a question of limitation involving a mixed question of law and fact—*Bhuvan Lal v Monohari* 78 Ind Cas 960 A I R 1925 Nag 178

A plea of limitation as regards an application for execution can be taken at any time during the pendency of the execution proceedings thus so long as an application for execution is pending the judgment-debtor can at any time show that the application is barred and the Court has no option but to dismiss it under this section. It is only when the point of limitation is concluded by proceedings in a previous execution that the judgment-debtor is not allowed to take an objection on the score of limitation in a subsequent execution of the decree—*Kesha Prasad v Harbans Lal* P L T 22 33 Ind Cas 85. An objection as to limitation may be taken at any stage of the execution proceedings if the facts upon which the objection is based are patent upon the face of the record—*Ginjra Iyer v Lakhan Koer* 35 Ind Cas 337 (Patna)

A plea of limitation can be taken even though the defendants have on a previous occasion acknowledged their liability. Thus in a suit for money although it appeared that in a previous suit the defendants had admitted their liability with regard to certain instalments which were then time-barred and had stated that they were always ready and willing to pay still they were not precluded on any principle of estoppel from setting up the statute of limitation in the present suit—*Sitharama v Krishnasami* 38 Mad 374 (380)

28 Interference by High Court.—Where the lower Court allows an application which was clearly time barred without at all applying its mind to the question of limitation in the case the lower Court acts without jurisdiction and the High Court has the right to interfere in revision under sec 115 C P Code—*Kalijaparama v Chetty Firm* 9 L B R 71 *Asanand v Jhangi* 1919 P W R 2 P L R 29 *Panchu Mandal v Isaf* 17 C W N 667

29 Suit by a pauper.—Where during the pendency of an application for pauperism and before it is accepted or rejected by the Court the applicant upon an objection by the defendant pays into Court the necessary Court fee the date of the application and not the date of such payment is the date of institution of the suit and limitation for the suit runs aga

This section does not extend the period of limitation for preferring a suit or appeal but simply says that the days during which the Court is closed are treated as non-existent or *dies non*—*Giriya Nath v Palani Bibee*, 17 Cal 263 (at p 266)

32 Application of this section to special or local laws.—This section applies although the case is governed by special or local laws. See section 29 (2) (a) (as now amended by the Limitation Amendment Act X of 1922) by which the provisions of section 4 have been made expressly applicable “for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law.” Even before the Amendment Act was passed it was laid down in a number of decisions that the general provisions of this section (as well as the following section) should apply to a special or local law—*Kullayappa v Lakshmi pathi* 12 Mad 467 *Nizabatulla v Hajar* 8 Cal 910 *Behary v Mongola* 5 Cal 110 *Varjam v Hadhara* 1918 P W R 88 *Subbarayan v Natarajan* 45 Mad 785 (per Ramesam J)

Thus if the Court be closed on or before the last day of the period limited the judgment debtor may pay the sum of money into Court under Sec 174 of the Bengal Tenancy Act to set aside the sale ‘on the first day the Court re-opens notwithstanding the absence of express provision to that effect—*Shooshee v Gobind* 18 Cal 231. Similarly, if the last day for a suit under sec 77 of the Registration Act expires on a holiday, a suit instituted on the next re-opening day is not time barred—*Ahad v Bahar Ali* 16 C W N 721 14 Ind Cas 173, *Matabbar v Shashi*, 16 C W N 20 12 Ind Cas 33. So also, an application under sec 22 of the Provincial Insolvency Act (1907) may be made on the re-opening day, if the 21 days from the decision complained of expire on a holiday—*Bhatron Prosad v Dass*, 17 A L J 787. Similarly, where the last day for filing a suit under sec 87 of Madras Harbour Trust Act (II of 1886) was a holiday, the suit could be filed on the next opening day—*Haji Ismail v Trustee of the Harbour Madras*, 23 Mad 389. Where the period of limitation for an appeal under section 119A of the Oudh Rent Act expired on a holiday, and the appeal was filed on the day following held that the appeal was filed within time—*Binda Pershad v Ram Bhajan*, 17 O C 254, 25 Ind Cas 703.

In some cases, a distinction was drawn between an Act which is a complete Code in itself, and an Act which is not so and it was laid down that ‘the general provisions of the Limitation Act (secs 4 to 25) are applicable to proceedings under special or local laws unless the special or local law is a complete Code in itself to which the provisions of the Limitation Act cannot be applied without incongruity. Thus the N W P Rent Act is not a complete Code in itself and is particularly incomplete as regards provisions regarding limitation, consequently there is nothing to exclude the application of sec 4 of the Limitation Act to the Rent Act

—*Bens Prosad v. Dhuraka* 23 All 277 But the Oudh Rent Act is a complete Code in itself containing rules of limitation complete in themselves and is not affected by the general provisions of the Limitation Act —*Parghulur v. Sheo Charan* 4 O C 182 So also the Bengal Rent Act VII of 1859 being a complete Code as regards limitation, the provisions of section 4 of the Limitation Act did not apply, and if the last day for a suit for rent under the Rent Act was a holiday, a plaint filed on the following day was barred—*Purran Chunder v. Mutty Lal*, 4 Cal 50 The Registration Act being a complete Code in itself, the provisions of the Limitation Act did not apply to a suit instituted under sec 77 of that Act —*Appa Rau v. Arisnamurthi* 20 Mad 249, *Vetramma v. Abbiah*, 18 Mad 99 *Su'rahmanian v. Krishna Aiyar*, 26 M L J 397, 23 Ind Cas 23 The Letters Patent (Lahore) together with the rules framed thereunder as to limitation for filing appeals are a complete Code in themselves and therefore the general provisions of the Limitation Act did not apply to appeals filed under sec 10 of the Letters Patent—*Dial Singh v. Buddha Singh*, 2 Lah 127, 61 Ind Cas 327, *Fateh Mahomed v. Chothu Ram*, 3 Lah L J 361. See also *Deoki Lal v. Ramanand Lal*, 5 P L J 701 (cited under Sec 12)

This distinction will no longer hold good by reason of the express provisions of section 29 as now amended and section 4 will apply to all special or local laws, whether they are complete Codes or not

33 Applicability of section to private agreements —Section 4 applies where a certain period has been prescribed by a statute and has no application to a case where a certain date has been fixed for payment by agreement of parties Thus, after a sale in execution of a decree the decree-holder agreed to have the sale set aside on receipt of the decretal amount within two months from the date of sale The last day of the two months expired when the Court was closed for annual vacation and the judgment-debtor deposited the decretal amount in Court on the re opening of the Court Held that the decretal amount not having been paid to the decreeholder within 2 months from the date of sale the sale could not be set aside and the fact that the Court was closed when the two months expired would not entitle the judgment debtor to get the benefit of Section 4 and to deposit the money on the re-opening day—*Adya Singh v. Nasir Singh*, 1 P L T 227 56 Ind Cas 495 But in a Nagpur case where the last day of payment of the money under a compromise decree was a holiday, and the Appellant deposited the money in Court on the day the Court re opened Held that there was a valid compliance with the decree The reason is that where the decree directs payment to the decreeholder, payment into Court is a valid compliance with the decree unless the Court directs that payment should be to the decreeholder and not otherwise—*Dhanu v. Kesko Prosad*, 19 N L R 116 A I R 1923 Nag 246, 72 Ind Cas 388

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Thus if the Court be closed on or before the last day of the period limited the judgment debtor may pay the sum of money into Court under Sec 174 of the Bengal Tenancy Act to set aside the sale 'on the first day the Court re opens notwithstanding the absence of express provision to that effect—*Shooshee v Golind* 18 Cal 231 Similarly if the last day for a suit under sec 77 of the Registration Act expires on a holiday, a suit instituted on the next re opening day is not time barred—*Ahad v Bahar Ali* 10 C W N 721 14 Ind Cas 173, *Natabbar v Shashi*, 16 C W N 20 12 Ind Cas 33 So also an application under sec 22 of the Provincial Insolvency Act (1907) may be made on the re opening day, if the 21 days from the decision complained of expire on a holiday—*Bhairon Prasad v Dass* 17 A L J 787 Similarly where the last day for filing a suit under sec 87 of Madras Harbour Trust Act (II of 1886) was a holiday, the suit could be filed on the next opening day—*Haji Ismail v Trustee of the Harbour Madras*, 23 Mad 389 Where the period of limitation for an appeal under section 119A of the Oudh Rent Act expired on a holiday, and the appeal was filed on the day following held that the appeal was filed within time—*Binda Pershad v Ram Bhajan*, 17 O C 254 25 Ind Cas 703

In some cases a distinction was drawn between an Act which is a complete Code in itself and an Act which is not so, and it was laid down that 'the general provisions of the Limitation Act (secs 4 to 25) are applicable to proceedings under special or local laws unless the special or local law is a complete Code in itself to which the provisions of the Limitation Act cannot be applied without incongruity' Thus the A W P Rent Act is not a complete Code in itself and is particularly incomplete as regards provisions regarding limitation, consequently there is nothing to exclude the application of sec 4 of the Limitation Act to the Rent Act

on dates when arrangements are made and notified for the reception of plaintiffs—*Pitta kessam v. Rappanna*, 13 Mad 447 (at p 451). If, however, the Court office is open during the vacation and there is some one present who is entitled to receive the plaint, but there is no one who can decide that it shall be admitted and put on the files of the Court, the plaint is in time if presented on the first day on which there is such last mentioned officer present—*Garpal v. Hira* 29 P R 1891

A Court is not said to be closed if the presiding officer is on tour. The plaint in such cases is to be presented to such officer in his camp—*Receiser v. Surapparam* 35 Mad 215 (1 B) 29 Ind Cas 449

36. Re-opening of Court.—Where the Court, instead of re-opening on the day that it should have re-opened, re-opened on a later day under an authorised order of a higher Court a plaint presented on the latter date was within time—*Bishan v. Ahmad* 1 All 263

37. Closing of wrong Court.—The period during which the Court in which a suit was wrongly instituted was closed, will not be excluded. Thus where a suit was filed in the Munsif's Court on the day on which the Court re-opened after the vacation, but the Munsif found he had no jurisdiction, and on the same day the suit was filed in the Small Cause Court, held that the plaintiff could not claim the benefit of this section so as to exclude the time during which the Munsif's Court was closed, because the suit was not instituted in the Small Cause Court on the day on which that Court re-opened—*Alkoya v. Gaur*, 24 W R 26

Similarly, a suit was filed in the Sub Judge's Court at Agra on June 2, 1913. Limitation expired on June 1, which was a holiday. The Agra Court held that it had no jurisdiction and on January 21, 1914 returned the plaint to be presented to the Court of the Sub Judge at Aligarh. It was so presented on January 22. Held, that the suit was barred, for though the plaintiff might be entitled under sec. 14 to deduct the time during which the suit was pending in the wrong Court, he was not entitled to the exclusion of the extra-day, viz. June 1, on which the wrong Court was closed—*Mahund v. Ramraj*, 14 A L J 310, 35 Ind Cas 292, *Ramalinga v. Subba Iyer*, 24 M L T 214, 47 Ind Cas 624, *Mohideen v. Nallaperumal*, 36 Mad 131, 12 Ind Cas 58, *Ummathu v. Pathumma*, 44 Mad. 817. See this subject discussed under sec. 14

38. Acknowledgment during holidays.—An acknowledgment given after the period of limitation but while the right to sue subsists owing to the intervention of the vacation during which the Court is closed does not save limitation, because an acknowledgment, according to the strict words of sec. 19, must be given before the expiration of the period—*Hemkore v. Masamalli*, 26 Bom 782

39. Assignment of debt during holidays.—When the period for a suit to recover a debt expires during the Court's re-opening, the debt is assigned, the suit brought by the

34. *Period of grace*:—The "period of limitation" in this section means not only the period prescribed by the first Schedule but also includes the period of grace allowed by section 31. If the period of grace expires on a Sunday, a suit instituted on Monday would be in time—*Murugesu v Ramaswamy*, 26 M L J 23, 21 Ind Cas 770. *Heera v. Amarti*, 34 All. 345. *Contra*—*Sheodas Daulatram v Narayan*, 36 Bom. 268, 12 Ind Cas 811 and *Balkrishna v Tima*, 7 N L R 176, 12 Ind Cas. 810 (where it has been held that the period of two years' grace specified in section 31 is not the period of limitation 'prescribed' within the meaning of this section)

In *Rahmatul v Suko Ashraf Ali*, 15 O C 373, 15 Ind Cas 439, the Court held that although the holiday on which the period of grace expired would not be deducted under Sec. 4 of the Limitation Act, yet it would be excluded under the provisions of Sec. 10 of the General Clauses Act.

35. *Court closed*—This section will apply even if the office of the Court is working in the vacation for urgent work. Thus, if the Prothonotary's office be open for the receipt of urgent work in the vacation, a plaint may be filed on the opening day of the term, because the receipt of a plaint is not an urgent work—*Ranchordas v Pestonji*, 9 Bom L R 1329. A Court is said to be closed even though the Judge holds Court on a Gazetted holiday—*Doyamma v Balajee*, 20 Mad 469 (470) *Kalyanasundrappa v Chinnasami*, 17 L W 413, 72 Ind Cas 13, (but see 1886 P J. 262 below), or if the Court is closed in an unauthorized manner—*Dishan Perakash v Daboo Misser*, 8 W R 73.

Though the Court offices may be actually open during the vacation for other work, if there is no one lawfully required to be present for the purpose of receiving a plaint or a petition of appeal or application, the Court will be held to be closed for the purposes of this section. See *Nardattalabh v Alibhai*, 6 B H C R 254 (cited under section 3). But if the offices of the Court are open during the holidays and there is also a Judge or clerk of the Court at hand for the purpose of attending to plaints, appeals and applications, the Court cannot be said to be closed within the meaning of this section, and all plaints, appeals and applications which are about to be barred during the vacation should be presented before the period of limitation actually expires. If they are not presented till the Court fully reopens after the vacation, it cannot be said that the Court was closed at the time they ought to have been presented in the ordinary course of things—*Skieram v. Dharania*, (1886) P J 262; *British India Steam Navigation Co v Sharafally*, 46 Mad 938. Where the Court adjourned for two months, but opened twice a week for one hour only, for the reception of plaints, petitions, etc., the Court was not closed within the meaning of this section so as to entitle the appellant to present his appeal on the first day the Court sat after the adjournment—*Nachiyappa v. Ayyasami*, 5 Mad 169 (17 B). A Court cannot be regarded as closed

on days when arrangements are made and notified for the reception of plaintiffs—*Parra Kesam v. Bapanna* 13 Mad 447 (at p 451) If, however, the Court office is open during the vacation and there is some one present who is entitled to receive the plaint but there is no one who can decide that it shall be admitted and put on the files of the Court, the plaint is in time if presented on the first day on which there is such last mentioned officer present—*Ganpat v. Hira* 9 P R 1891

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36 Re-opening of Court.—Where the Court instead of re-opening on the day that it should have re-opened re-opened on a later day under an authorised order of a higher Court a plaint presented on the latter date was within time—*Dishan v. Ahmad* 1 All 263

37 Closing of wrong Court.—The period during which the Court in which a suit was wrongly instituted was closed, will not be excluded. Thus where a suit was filed in the Munsif's Court on the day on which the Court re-opened after the vacation but the Munsif found he had no jurisdiction and on the same day the suit was filed in the Small Cause Court held that the plaintiff could not claim the benefit of this section so as to exclude the time during which the Munsif's Court was closed because the suit was not instituted in the Small Cause Court on the day on which that Court re-opened—*Abhaya v. Gair*, 24 W R 26

Similarly a suit was filed in the Sub Judge's Court at Agra on June 2, 1913. Limitation expired on June 1 which was a holiday. The Agra Court held that it had no jurisdiction and on January 21, 1914 returned the plaint to be presented to the Court of the Sub Judge at Aligarh. It was so presented on January 22. Held that the suit was barred for though the plaintiff might be entitled under sec. 14 to deduct the time during which the suit was pending in the wrong Court he was not entitled to the exclusion of the extra-day, viz June 1 on which the wrong Court was closed—*Mahund v. Ramraj* 14 A L J 310 35 Ind Cas 292 *Ramalinga v. Subba Iyer*, 24 M L T 214 47 Ind Cas 624 *Mohideen v. Nallaperumal* 36 Mad 131, 12 Ind Cas 58 *Ummalhu v. Pathumma* 44 Mad 817 See this subject discussed under sec 14

38 Acknowledgment during holidays.—An acknowledgment given after the period of limitation but while the right to sue subsists owing to the intervention of the vacation during which the Court is closed does not save limitation because an acknowledgment according to the strict words of sec 19 must be given before the expiration of the period—*Hemkore v. Masamalli* 26 Bom 782

39 Assignment of debt during holidays.—When the period prescribed for a suit to recover a debt expires during the Court vacation and before re-opening the debt is assigned, the suit brought by the assignee on the

re-opening day is within time—*Visram v Tjabji* 15 Bom L R 348, 19 Ind Cas 820

40 Pleading —When the period of limitation for a suit expires on a Gazetted holiday, and the plaint is presented on the day the Court re-opens it is not necessary for the plaintiff to state explicitly in the plaint that on the day on which the period of limitation expired the Court was closed—*Teckchand v Patto* 16 N L R 198 56 Ind Cas 976

5 Any appeal or application for a review of judgment or

Extension of period for leave to appeal or any other application in certain cases

to which this section may be made applicable by or under any enactment * * * for the time being in force may be admitted after the period of limitation prescribed therefor when the appellant or applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period

Explanation —The fact that the appellant or applicant was misled by any order practice or judgment of the High Court in ascertaining or computing the prescribed period of limitation may be sufficient cause within the meaning of this section

Change —By the Limitation Amendment Act N of 1922, the words by or under any enactment have been substituted for the words by any enactment or rule The reason has been thus stated We think that the words made applicable by any enactment or rule are in so far as they apply to rules vague inasmuch as there is no definition of the term rule The intention no doubt is to refer to a statutory rule or a rule having the force of law e g rules contained in the schedule to the Code of Civil Procedure and in particular order 22 rule 9 We would therefore amend section 5 by substituting the words by or under any enactment for the words by any enactment or rule —*Report of the Select Committee* (Gazette of India 1922 Part V page 73) As to the effect of this amendment see the Full Bench case of *Krishnamachariar v Srirangammal*, 47 Mad 824 47 M L J 409 80 Ind Cas 877 A I R 1925 Mad 14

41 Scope of Section —This section under the old Act of 1877 did not include any other application except an application for review of judgment Thus it did not apply to an application for leave to appeal as a pauper—*Parvati v Bhole* 12 All 79 *Sarat Chandra v Brojeswar*, 30 Cal 790 *P C Roy v Thakur Ram*, 10 C W N 149 (I B) nor to an application for leave to appeal to the Privy Council—*In the matter of Sita Ram* 15 All 14 *Merola v Ghanasham* 19 Bom 301, *Veeramiah v Abbiah* 18 Mad 99 (I B) But now the present section will apply to these applications

The High Court has power to frame a rule making the provisions of this section applicable to applications for setting aside *ex parte* decrees—*Krishnamachariar v. Srinangammal* (supra). In Madras, this section has been made applicable by a Rule of the High Court to applications to set aside an *ex parte* decree whether in ordinary Courts or in Small Cause Courts and the delay in making the payment required to be made with an application to set aside an *ex parte* decree under the proviso to section 17 (1) of the Prov. Small Cause Courts Act can be excused if there be sufficient cause for it—*Sudhaisamuthu v. Andi Reddiar* 45 Mad 628, 42 M L J 484 A I R 1922 Mad 186. But in U P, Oudh, Panjab and Burma this section has not been made applicable to an application to set aside an *ex parte* decree—*Gadre v. Brijnandan* 45 All 332 (334), *Khairat v. Umar Din* 66 Ind Cas 270 (Lah) *Ma Nau v. Somasundaram*, 2 Rang 655 85 Ind Cas 324 *Sitabai v. Mata Din*, 2 O W N 440, A I R 1925 Oudh 446.

It should also be noted that this section does not apply to *suits*. This section applies only to those proceedings which are specifically mentioned in the section or to which the section may be made applicable by or under any enactment for the time being in force. A suit is not specifically mentioned in this section nor are the provisions of this section made applicable to it by any enactment—*Ram Pher v. Ajudhia Singh* 12 O L J. 66, 2 O W N 144 A I R 1925 Oudh 369. The reason is that the period of limitation allowed in most of the suits extends from three to twelve years whereas in appeals and the applications mentioned in this section it does not exceed six months therefore it is necessary that some concession should be made in respect of these appeals and applications to provide for those circumstances which hinder a person from filing his appeal or application within the short space of time allowed.

This section has not been made applicable by any enactment to an application (under O 9 r 9 C P Code) to set aside a dismissal for default of appearance—*Mahadeo v. Lakshminarayan*, 49 Bom 839, 27 Bom L R. 1150, A I R 1925 Bom 521, *Ma Nau v. Somasundaram*, 2 Rang. 655, A I R 1925 Rang 187. So also, this section does not apply to an application to set aside an auction sale under O 21, r 89, C P Code—*Ram Aukar v. Sheo Peary*, 12 O L J 137, A I R 1925 Oudh 411. This section does not apply to an application for *substitution* of the name of a defendant or respondent under O XXII, r 4, made beyond six months [now three months] of his death. An application for substitution made beyond the period of limitation must therefore be rejected and the suit will abate. But it is open to the plaintiff or appellant to make an application under O XXII r 9 to have the order of abatement set aside on the ground that he was prevented by sufficient cause from continuing the suit—*Secretary of State v. Jowahir*, 36 All 235, 25 Ind Cas 48.

with 6 P I J 237 3 P I T 96 A I R 1923 Pat 140 The question is whether the error is one which might have easily occurred even if reasonably due care and attention has been exercised by the pleader—*Tin Tin Nyao v. Muong Ba Saung* 1 Rang 534

The tendency of recent English cases is to disallow an extension of time on the ground of mistake of Counsel see *In re Helsby* [1894] 1 Q B 74 (Judgment of Davey J) This principle of English law was sought to be applied in this country but in *Shib Dayal v. Jagannath* 44 All 636 (19) the Judges remarked that although legal education has progressed in this country and the Courts are right in demanding increasing competence in legal practitioners still having regard to the disadvantages of practitioners in places remote from Law Libraries and to the fact that there is in the mofussil some want of knowledge of the procedure of the High Court the principle of English decisions should not be strictly applied in this country

By a piece of carelessness counsel for the appellant omitted to file a copy of the decree appealed against and instead filed a copy of a deposition The mistake was detected after the expiry of the period of limitation It was held that the Court should allow the copy of the decree to be filed—*Harjas v. Kahn* 85 P R 1913 When an appellant obtained a copy of the decree to be appealed against and gave it in time to his Vakil but by some mistake the Vakil did not file the copy of the decree and died soon after the High Court excused the delay and accepted the copy at the hearing of the appeal—*Prosarana Kumari v. Ram Chandra* 17 C I J 117 Ind Cas 155 Where the delay in the production of the first Court's judgment was due to the mistake of the Vakil in applying for a copy of the decree instead of a judgment the delay in the production of the same must be excused under this section—*Gum of Anba Parsad v. Juthi Dal* 77 P L R 239 8 Lah L J 101

Act XXVI of 1910 which cut down the time for leave to appeal to the Privy Council and for substitution of legal representatives from 6 months to 3 months came into force on 1st January 1921 In respect of a judgment delivered a few days later the party on the advice of his local pleaders applied for leave within the six months period but after the 3 months' period had expired There was a delay of only 14 days Held that as the amending Act was very recently passed it took some time before the curtailed period of limitation came to be generally known and the amending Act was not available in any of the books on the Indian Limitation Act that might be referred to for the purpose Under these circumstances the local pleaders might honestly though mistakenly be under the belief that the period was six months and so it was a fit case for excusing the delay under this section—*Agindar v. Nayari* 48 Bom 442 26 Bom L R 315 80 Ind Cas 872 A I R 1924 Bom 399, *Laubhathia v. Gajendram* 41 M L J 65 For a case in which the delay was not

excused on this ground see *Padamray v M D Kaisha*, A I R 1924 Nag 279 78 Ind Cas 154

A *bona fide* mistake of calculation on the part of the appellant's pleader is a sufficient cause—*Bishandai v Nandan*, 12 C W N 25, *Rakkhal Chandra v Ashutosh* 17 C W N 807 19 Ind Cas 931 But in *Zaibunnissa v Aulsam* 1 All 250 such a mistake was not held to be a sufficient cause

49A Mistake of law — A mistake or ignorance of law is not a sufficient cause The maxim *Ignorantia legis neminem excusat* (ignorance of law is no excuse) has been so firmly settled both in England and India that it would be the shaking of established authority to maintain that ignorance of law or mistakes of law are reasons for the excuse, and as such furnish elements for extending the period of limitation which the statute law has provided—*Ramjiwan Mal v Chand Mal*, 10 All 587 (597), *Jug Lal v Har Narain* 10 All 524 (529), *Brij Indar v Kanshi Ram*, 45 Cal 91 106 (P C) Therefore if an appellant prefers an appeal from a decree for an amount exceeding Rs 5000, to the District Judge instead of to the High Court, and after it is returned by the former Court files it subsequently in the latter Court at a time when the period of limitation has expired, the mistake cannot be excused under this section—*Ibid* So also, an appellant filing an appeal after the expiry of the period of limitation owing to a stupid misconstruction of the lower Court's order appealed against is not entitled to the benefit given under this section—*Hasibunnissa v Bishnath* 13 O L J 172, A I R 1926 Oudh 206 The fact that the appellant was under the impression that the limitation was 90 days was no reason for extending the period—*Dial Singh v Buddha Singh*, 2 Lah 127, 61 Ind Cas 327 The Bombay High Court also holds that mere ignorance of law cannot be recognised as sufficient cause for delay, for that would be a premium on ignorance—*Sitaram v Nimba*, 12 Bom 320 (per West J)

But if the mistake be *bona fide* it will be considered as sufficient cause within the meaning of this section The true rule is, whether under the special circumstances of each case the appellant acted under an honest though mistaken belief formed with due care and attention—*Krishna v Chalkappan*, 13 Mad 269 (271) Before a mistake of law can be accepted as sufficient cause, it is necessary to satisfy the Court not only that the mistake was honestly made, but also that it was made despite due care and attention on the part of the appellant or his pleader—*Fakir Chand v Municipal Committee*, 59 P R 1913 18 Ind Cas 37 And so, where the appellant who as a pleader should have known the law on the subject, had the advantage of the advice of a leading pleader of the Chief Court, but for reasons best known to himself went against that advice in preferring the appeal, it was held that the appellant had no sufficient cause for not instituting the appeal within the period of limitation, as he could

not possibly have made the mistake had he taken the precaution of discussing the subject with his pleader with reference to the question of limitation and to the case law on the point and that his mistake though honest was the result of either carelessness or an erroneous assumption of knowledge which he took no care to verify—*Ibid* Where the appellant was an ignorant milkman having no experience of any previous litigation and though he knew of the respondent's death he did not know that the substitution of his legal representatives was necessary and he came to know of this when it was too late to apply for substitution of the deceased respondent's legal representatives *held* that under the circumstances of the case the delay was *bona fide* and sufficient cause was shown under this section—*Krishna Mohan v Sirapati* 29 C W N 472 A I R 1925 Cal 684 See also Notes 50 and 51 below It should be noted in this connection that in a Full Bench case of the Allahabad High Court (*Becl v Ahsanullah* 12 All 461) Mahmood J expressed an opinion that speaking with strict accuracy there can be no such thing as a *bona fide* mistake of law for good faith implies due care and caution and he quoted with approval the words of West J in the Bombay case cited above

50 Wrong proceedings taken in good faith —Where a person *bona fide* thinking that it was the proper course filed a suit instead of appealing from a decree and soon after found out the error and preferred the appeal it was a sufficient cause —*Glulam v Shalbar* 162 P R 1888 *Sitaram v Nimba* 12 Bom 320

Similarly where a person believing in good faith that a petition for revision and not an appeal was the proper remedy and in pursuance of that belief presented the petition it was a sufficient cause for subsequently preferring an appeal after the period of limitation—*Balwant v Giman* 5 All 591 *Hardwan v Raja Prolab* 5 O C 183 But if he does not act in good faith i.e. if he knows properly well that he ought to file an appeal but still he files an application for revision it will not be considered a sufficient cause for afterwards filing an appeal out of time—*Umed Ali v Municipal Committee* 2 Lah 1 (4) 56 Ind Cas 148

The time taken in applying for a review of judgment may be deducted in calculating the period of limitation for an application for leave to appeal to the Privy Council—*Nariman v Hasham* 26 Bom L R 1261 49 Bom 149 A I R 1925 Bom 137

So also the preferring of an application for review will be considered as a sufficient cause for delay in filing an appeal if the appellant can shew that the grounds for review were reasonable and proper and that these grounds could not be grounds for appeal as well—*Ashanulla v Collector of Dacca* 15 Cal 242 *Govinda v Bhandari* 14 Mad 81 *Sudhakar v Sadashiv* 19 C W N 1113 31 Ind Cas 705 *Gobind v Shiva Das* 33 Cal 1323 (1329) *Haradhan v Prankrishna* 10 C L J 39 *Pundlik v Achut* 18 Bom 84 *Waryam v Wadhava* 1918 P W R 88 *Karlash*

v. Brijoi, 80 Ind Cas 786, A I R 1925 Cal 253. *Shah Mahomed v Md Roskan*, 26 P L R 456, 88 Ind Cas 327. *Messadi Lal v Badhawa*, 100 P R 1910. *Maung Lun v Maung Dun*, 1 Bur L J 154. 74 Ind Cas 39. *Hanumal v Atma Ram* 1915 P W R 239. *Parbhu v Murlidhar*, 22 A L J 365. 78 Ind Cas 677. A I R 1924 All 867. But the mere fact that the appellant had applied for review is not a sufficient cause for not filing his appeal within time and he is not always entitled to be allowed a deduction of time spent in applying for a review of judgment. The true guide is whether the appellant has acted with *reasonable diligence* (on the application of the principle of section 14), and he ought ordinarily to be deemed to have acted with due diligence when the whole period between the date of the decree appealed against and the date of presenting the appeal does not after excluding the time spent in prosecuting with due diligence a proper application for review of judgment, exceed the period prescribed by law for presenting the appeal—*Karam Baksh v Daulat Ram*, 183 P R 1888. *Brij Indar v Kanshi Ram*, 45 Cal 94, 105 (P C), *In re Brijendra Coomarr Roy* 7 W R 529 (F B). All that the appellant has to show under this section is that he prosecuted the review application with due diligence and that there were reasonable grounds for filing such an application for review. But it is not necessary for him to show that his application for review *had a prospect of success*—*Ramdhani v Khashardas*, 92 Ind Cas 1031. A I R 1926 Cal 677. If it appears that the plaintiff had not prosecuted his application for review with *due diligence*, he will not be entitled to get a deduction of time spent in the review proceedings. Thus where the plaintiff's suit was dismissed on the 15th August, and on the 10th November i.e. nearly three months after, he presented an application for review which was rejected on the 15th November, whereupon he preferred an appeal it was held that the plaintiff appellant was not entitled to an indulgence under this section as the application for review was not prosecuted with reasonable diligence—*Azizuddin v Bhag Mal*, 107 P R 1918. 46 Ind Cas 23. *Govinda v Bhandari*, 14 Mad. 81.

Again, immediately after the termination of the wrong proceedings (whether the proceedings be in review or revision) the appeal must be preferred with due diligence in order to get the benefit of this section—*Kuller v Jeevin* 22 W R 79. *Krishnadas v Rahimannissa*, A I R 1926 Cal 457. *Ganga v Madha* 89 P R 1832. *Sakiba v Hira* 166 P R 1883. *Karam Baksh v Daulat Ram* 183 P R 1888. *Ganda Singh v Javala*, 1911 P W R 222. 10 Ind Cas 129. In other words, there should be diligence throughout, both before and after the wrong proceedings—*Ram Charita v Ram Narayan*, 52 Ind Cas 950.

51. Proceedings in wrong Court through bona fide mistake.—Where an appellant preferred an appeal to a wrong Court, believing *bona fide* that the appeal lay there that is a sufficient cause, and the appellant is entitled to deduct the time during which the appeal was pending in the

wrong Court—*Balaram v Sham*, 23 Cal 526, *Dadabhai v Maneksha*, 21 Bom 552, *Rupa Thakurani v Kumud Nath*, 22 C W N. 594, 46 Ind Cas 116, *Hurro Chunder v Surnomayi*, 13 Cal 266, *Mahabat Rai v Bharadwaj* 15 A L J 200, *Krishna v Chathappan*, 13 Mad 269, *Indar Lal v Deoji*, 4 A L J 1, *Sardar Partap v Lala Karam*, 184 P R 1889 *Mg Sin v Mg Po* 4 Bur L T 224 Although section 14 does not apply to appeals, still the circumstances mentioned in that section (*viz* proceeding in a wrong Court through *bona fide* mistake) may be considered as a sufficient cause within the meaning of section 5 so that the time during which an appeal has been preferred and pending in a wrong Court may be excluded for the purpose of calculating time, and the Court may excuse the delay in bringing the appeal before the proper Court—*Balwant v Guman* 5 All 591 *Kumudini v Kamala Kanta*, 35 C L J 106, 68 Ind Cas 575 But in order to claim the benefit of this section the appellant must satisfy that the mistake is *bona fide*, i.e. made under an honest though mistaken belief formed with due care and attention that he was appealing to the right Court otherwise it will not be considered as a sufficient cause—*Jaglal v Har Narain* 10 All 524, *Ramjiwan v Chand Mal*, 10 All 587 (594)

Thus where the appellant was reasonably led into the mistaken belief that the valuation of the suit was such that an appeal lay to the High Court and not to the District Court, *held* that this would constitute a sufficient cause for excusing the delay in presenting the appeal to the proper Court—*Tulso Kanwar v Gajraj Sing*, 25 All 71, *Huro v Surnomayi*, 13 Cal 266 *Krishna v Chathappan*, 13 Mad 269, *Gauhar v Khan Mahammad*, 66 P R 1891 Where a criminal appeal preferred by the appellant (who was in jail) was erroneously presented by his counsel in the High Court instead of in the Sessions Court, *held* that the mistake made by the counsel should be excused, and the appeal should be allowed to be presented to the proper Court though the period of limitation had expired—*Sarta Singh v Emperor*, 1 Lah 508, 59 Ind Cas 556 Where the appellant wrongly preferred his appeal to the Commissioner, and the Commissioner himself was also under the impression that the appeal was entertainable by him, *held* that there was a *bona fide* mistake—*Chob v. Daryai*, A I R 1924 All 915, 82 Ind Cas 594

But where the appellants being themselves pleaders and well acquainted with the facts of the case, preferred an appeal to a wrong Court, it was *held* that they did not act in good faith but with gross negligence and carelessness and were not entitled to an extension of time—*Sarat Chander v Saraswati*, 34 Cal 216 So also, where an appeal against a decree for an amount exceeding Rs 5,000 was first presented to the Divisional Judge who had no pecuniary jurisdiction to hear the appeal, and who therefore returned the appeal for presentation to the Chief Court, where it was subsequently presented but after the prescribed period for limitation,

held that there was no *bona fide* mistake but gross carelessness and oversight avoidable with due diligence on the part of the pleader and the delay was not excusable—*Sant Singh v Qaim* 118 P R 1908 Where the memorandum of appeal filed in a wrong Court was returned by that Court on the 11th December and the appeal was afterwards filed in the right Court on the 20th December i.e. 9 days after and no explanation was offered as to the nine days delay it could not be said that the appellant acted *bona fide* i.e. with due care and diligence and he was not therefore entitled to the indulgence of this section—*Ramjiwan v Chand Mal* 10 All 587 Where the appellant knew that the appeal lay to the High Court but still he preferred his appeal to the District Judge who returned the petition of appeal which was afterwards presented to the High Court beyond time *held* that there was no sufficient cause for excusing the delay—*Daudbhai v Emuabai* 28 Bom 235 *Umrao Bahsh v Malik Md Khan* 1 I R 193 Lah 61 7-10d Cas 732

Where the appellant acting *bona fide* on his counsel's advice filed an appeal in a wrong Court the counsel acting with due care and attention there was sufficient cause—*Nawab Mirza Muhammad Bakar Ali Khan v Muhammad Bakar* 10 O C 291 294

52 Amendment of decree.—Time should be taken to have run from the date of the decree as originally drawn up and every amendment made in the decree does not necessarily entitle a party to claim an extension of time for filing an appeal. Whether there is sufficient cause must depend upon the circumstances of each individual case. If the grounds on which the appeal is based are intimately connected with the amendment of the decree or if the grounds are directed against the decree only in so far as it has been amended the Court should hold that there was sufficient cause but if the amendment has no relation to the grounds of appeal the appeal should not be admitted after time—*Drojo Lal v Tara Prosanna* 3 C L J 188 192 *Sati Kantha v Ram Chandra* 34 Ind Cas 556 (Cal) Thus in a suit for arrears of revenue a decree was passed for Rs. 125 on the 30th of May on the 15th August the plaintiff applied for amendment of the decree on the ground that the arrears of revenue amounted to Rs. 374 and the Court amended the decree then and there. On the 11th September the plaintiff preferred an appeal to the District Judge complaining of disallowance of interest in the decree. *Held* that as the question of interest could have been raised on the decree as originally passed and the appeal did not attack the decree in so far as it was amended or raise any question connected with the amendment the appellant was not entitled to any extension of time and his appeal was time barred—*Bohra Gajadhar Singh v Basant Lal* 43 All 380 19 A L J 152 61 Ind Cas 69 Where the decree was wrong as to the amount claimed and allowed it was held that the decree was wrong in a very material particular and the limitation for appeal should be reckoned from the date of the amended decree—*Amar*

Chandra v Asad Ali, 32 Cal 908 Where a mortgage decree passed on the 30th June 1914 omitted to specify the decretal amount that could be recovered from the house mortgaged, and the plaintiff applied for amendment which was granted on the 19th November 1914, and the defendant appealed on 19th February 1915, it was held that the defendants were not obliged to appeal from the decree of June 1914 at a time when the plaintiff had applied for an amendment, and that in any event an extension of time would be granted under this section, the appeal was not barred—*Har Krishen v Lahore Bank Ltd* 64 P R 1919

Where a decree which is wrongly drawn up is amended by the Court after the expiration of the time prescribed for appeal against the original decree the party affected by the amendment can appeal against the decree as amended and the delay will be excused under this section—*V s uanathan v Ramanathan* 24 Mad 646

53 Ignorance of fact —Where an application for bringing the legal representative of the deceased respondent on record was not made within the period of limitation by reason of the appellant not being aware, till shortly before the application of the death of the respondent who lived at a great distance from him it was held that the appellant had sufficient cause for not making the application within time—*Allah v Thakurdas* 1908 P L R 24

54 Judgment not pronounced in open Court —Where it appeared that the judgment of the lower Court had not been pronounced in open Court nor had any intimation been sent to the parties of any date for its pronouncement, and the appellant or his pleader did not discover what the decision was till after the expiry of the period prescribed for appeal, it was held that there was sufficient cause for excusing the delay in presenting the appeal—*Lalli v Sain* 27 P R 1919

55 Pauper appeal —Where an application for leave to appeal *in forma pauperis* is rejected and the appellant afterwards pays the full Court fee within the time granted by the Court but after the expiry of the period of limitation, held that there was a sufficient cause for allowing the regularly stamped appeal beyond the period of limitation—*Bai Gul v Dessai*, 22 Bom 849, *Bula v Paramanand* 84 P R 1904 *Girwar Lal v Lakshmi Narain*, 26 All 329 *Jumnabai v Vissondas* 21 Bom 576, *Chintamani v Ramchandra*, 34 Bom 589, *Bhagwan Das v Balwant*, 74 P R 1916, *Inlizam Begum v. Waziran*, 47 P R 1899 Where during the pendency of an application for leave to appeal *in forma pauperis*, the appellant acquires some property, whereupon he is declared not a pauper and is ordered to pay Court fee, and he takes time from the Court to pay the stamp, and pays the stamp within the time granted, though beyond the period of limitation, his appeal will be considered as presented on the date of the application for leave to appeal *in forma pauperis*, and therefore not barred The case comes under this section—*Durga Charan*

v. Dookhiram 6 Cal 925 *Shadi Khan v. Umida Begum* 191. P W R. 34

56 Inability to get stamps —The last day of filing an appeal was 13th July but on that day the appellant could not get a stamp. The next day was a holiday. The appeal was filed on the 15th. It was held that the delay was excusable under this section—*Kesho Prosad v. Harbans* 1 P L J 163 37 Ind Cas 11. But in a later Patna case it has been laid down that where the party is guilty of procrastination e.g. where the law has provided a time limit within which any particular step is to be taken and a party waits until the last moment before beginning to take action he is not entitled to the Court's indulgence if an unforeseen accident (e.g. inability to get stamps) prevents the step from being taken within the time prescribed by law—*Seth Jahan v. Prichard* 4 P L J 381 52 Ind Cas 125. In another Patna case the Judges have expressed the opinion that although appellants who are prevented from filing their appeal within time by difficulties encountered in procuring the necessary Court fee stamps may possibly rely upon those difficulties as constituting sufficient cause within the meaning of this section for not having filed the appeal within time still it must be remembered that such difficulties are really due to the litigant's inveterate habit of putting off the purchase of the Court fee and the filing of the appeal to the very last day—*Ran Sahay v. Kumar Lachmi Naraya* 3 P L J 74 42 Ind Cas 675.

In a Nagpur case also it has been held that an appellant who wilfully leaves the preparation and presentation of the appeal to the last day of the period of limitation is guilty of negligence and is not entitled to an extension of time if some unexpected or unforeseen contingency (e.g. inability to get stamps) prevents him from filing the appeal within time. This section was not provided to encourage negligence, prolixity and laxity—*Kedarnath v. Zumberlal* 12 N L R 171.

57 Other Cases —Filing an appeal as from an order made by a Court from a decree—*Manorath v. Balak* 1881 A W N 97. Cl. of a Court in receiving appeals and want of notice of a party—*Sukhdial v. Jay Singh* 101 P R 1890 taking an appellant to get himself declared a major—*Malharaj* 121 P R 1904 these are sufficient causes.

Where an application for review was filed out of time on account of negligence on the part of the applicant and even if there was new evidence the delay was excused under this section—*Bai N. Matullabu* 42 Bom 295. Where the rule requiring an appellant to file a copy of the judgment of the first Court has only been published in the Gazette a few days before the expiry of the time so that there had not been sufficient time for the rule to be known to the litigants and the appeal was filed within the time allowed by the appellant with the first Court's judgment within the time allowed.

after the expiry of the period of limitation *held* that there was sufficient cause for excusing the delay—*Muhammad Hassanuddin v Saif Ali* 4 Lah 122 74 Ind Cas 451 Where the question whether the decision of the Trial Court amounted to an order only or to a decree was a doubtful one and therefore insufficient Court fee was at first paid on the memorandum of appeal but full Court fee was made up after limitation *held* that there was sufficient cause to excuse the delay—*Raghubir v Sohan Devi* 6 Lah 233 86 Ind Cas 1 A I R 1925 Lah 381 Omission to sign a memorandum of appeal through oversight, which was otherwise in order and had been duly presented is a sufficient cause for extension of time—*Firm Mathra Das v Firm Ram Lal* 84 Ind Cas 518 (Lah)

58 Application for copy of decree with insufficient folios —A decree was passed on Dec 3 and signed on the following day and an application for a copy was made on the 10th with insufficient folios on the 11th the officer in charge made a report that the folios put in were insufficient and 9 more were required and the pleader for the appellant got the information the next day when he supplied the necessary folios the copy was ready for delivery on the 16th and the appeal was filed on January 8 next that is 36 days after the decree it was held that the Judge should not throw out the appeal as barred and that under the circumstances he should exercise his discretion under this section—*Dulali v Suroda* 3 C W N 55 See also *Kali Sankar v Bishantha Nath* 7 C W N 109

59 Defective Vakalatnama —A memorandum of appeal was signed and presented by two pleaders In the body of the Vakalatnama their names were not mentioned but at the foot of it there was an acceptance of the vakalatnama by both the pleaders At the hearing of the appeal an objection was taken that the presentation of the appeal was invalid whereupon a fresh vakalatnamah complete in every respect was filed but the Court rejected the appeal deeming it to have been presented on the latter date *Held* that the Court should have admitted the appeal under this section—*Shambhu Nath v Badri Das* 43 All 392 19 A L J 183 61 Ind Cas 410 See also *Ram Rup v Nash Ram* A I R 1926 All 252 91 Ind Cas 865

SUFFICIENT CAUSE, WHAT IS NOT —

60 Alteration of law —A new statement or exposition of the law or altering the view of the law by the High Court or the Privy Council is no sufficient cause for delay—*Mowri v Soorendra* 10 W R 178 *Anra v Gajan* 11 W R 130 *Makhan v Manchand* 5 B H C R A C 107 *Shama Churn v Bindaban* 9 W R 181 (F B) *Bimola v Dangoo* 19 W R 189 Thus the fact that a judgment altering the law has been delivered in another case after the time for appealing or applying for review has passed is no reason for admitting an appeal or review petition after time—*Makhan v Manchand* 5 B H C R 107 Where a judgment settling a point of law which arises in a case has been delivered before the

decision in that case but not reported till afterwards that is no reason for granting a review of judgment after the time has expired—*Achula v Mammit* 10 Mad 357

61 Ignorance of law —See Note 49\ under heading "Mistake of law" The fact that the appellant was a *pardanashin* lady and did not know that a copy of the decree was required to be filed along with the memorandum of appeal is no sufficient cause for extending the time to enable her to file a copy of the decree after the period of limitation—*Masum v Madan*, 1911 P W R 8 Ignorance of the effect of the judgment is no justification for delay in filing the review—*Golam v Syad* 8 Bom 260

62 Poverty —The poverty of the appellant in consequence of which he was not able to pay court fees in time and had to raise funds is not a sufficient cause for admitting an appeal out of time—*Moshaulla v Ahir dullah* 13 Cal 15 *Husaini v Collector* 9 All 635 (F B) *Krishna swamy v Ramaswami* 19 M L J 202, even the state of poverty coupled with the fact of the appellant being a *pardanashin* lady is no sufficient cause—*Husaini v Collector* 9 All 635 (F B)

63 *Pardanashin* lady —The mere fact of the appellant being a *pardanashin* lady is not a sufficient cause—*Husaini v Collector* 9 All 635 (F B) *Masum v Madan* 1911 P W R 8 It may be conceded that when the fact of the appellant being a *pardanashin* lady has prevented a party from presenting the appeal herself or from retaining counsel to do so it may furnish a ground for applying the discretionary power under this section but it cannot be laid down that whenever the appellant is a *pardanashin* there shall be no practical limit to the period during which her appeal must be presented—*Husaini Begum v Collector* 9 All 11 at page 18 (per Mahmood J) But where the applicant is a *pardanashin* lady whose legal interests are not prosecuted by her legal advisers with all the carefulness which the circumstances demand in consequence of which delays have occurred in instituting legal proceedings such delays ought to be excused—*Bai Neematba v Bai Nematullah* 42 Bom 295 (at p 300)

64 Negligence of pleader or his clerk —*Bona fide* mistake on the part of the pleader may be excused but want of care and attention on his part in seeing to the proper presentation of the appeal is no sufficient cause Thus where the counsel for the appellant had omitted to present his petition of appeal in due time although he had been furnished with the necessary papers and the necessary costs *Ield* that the negligence on the part of the counsel was not a sufficient cause for extension of time—*Buddhu v Dewan* 37 All 267 Carelessness on the part of the pleader in filing an appeal of value over Rs 5000 in the Divisional Judge's Court instead of in the Chief Court is not a sufficient cause for excusing the delay in the subsequent presentation of the appeal to the latter Court—*Sant Singh v Qaim* 118 P R 1908 Negligence of the vakil in filing

proper Court-fee stamps, when the deficiency of stamps in the memo. of appeal was pointed out to him by the Court, is not a sufficient cause for excusing the delay in filing the proper stamps—*Jodhon Prosad v Nanku Prosad*, 3 P L J 484

Filing of an appeal in a wrong Court through gross carelessness of the pleader is not a sufficient cause for presenting the appeal to the proper Court after the expiry of the period of limitation—*Mahammad v Ladha Singh* 23 P W R 1914 Where the appellant's mukhtar omitted to file his power of attorney and the copy of the first Court's judgment with the appeal and filed them long after the presentation of the appeal, and no reasons were given for the delay, the appeal was dismissed as barred by limitation—*Dhanna v B'azir*, 1919 P L R 94 The mere fact that the counsel entrusted with the task of filing an appeal forgot all about it till after the expiry of the period of limitation is not a sufficient cause for extending time—*Dilan v Ram Bharasay*, 1 O W N 880, A I. R. 1925 Oudh 374

Similarly, negligence of the pleader's clerk in applying for delivery of the copy of the decree and in filing the appeal would not be a sufficient cause of delay—*Allahdadshad v Mukhdum* 24 Ind Cas 977, 7 S L R. 201 Mistake of the pleader's clerk in filing the appeal out of time is no sufficient cause—*Ganesh v Hirde Bihari*, A I R, 1925 Oudh 189, 82 Ind Cas 484 But in a Punjab case, where the appellant's counsel prepared the grounds and gave them to his clerk 9 days before the expiry of the period of limitation, but the clerk finding that a copy of the judgment of the first Court was wanting directed the client's agent to get the same and kept the appeal by him till the said copy was obtained and then forgot to file the appeal in time, *held* that sufficient cause had been made out though the pleader was not free from blame—*Bibi Pulli v Jauala*, 1912 P. W. R. 126

65. Negligence of Appellant —Where an appellant obtained an uncertified copy of the decree in which the date of the decree was wrongly given, and the appellant's pleader was misled thereby, it was held that there was no sufficient cause of delay in filing an appeal from the decree —*Karachi Trading Co v. Tejchandras*, 8 S L R 235 Where an appellant filed an appeal without a copy of the right decree and it was proved that the whole procedure on the appellant's part was slack to the utmost, it was held that this section did not apply—*Gurprasad v Ram Samajo*, 13 A L J 1101 Where a copy of the decree, which was in existence at the time of preferring the appeal, was not attached to the memorandum of appeal, *held* that the memorandum was bad, and as no sufficient cause was shown for extending the time under this section, the appeal was dismissed—*Hem Chandra v Jadab Chandra*, 16 C L J. 116. So also, the presentation of second appeal with a copy of the first Court's judgment is not a proper presentation and time cannot be extended for filing it—

Rajan v. Kuria 4 Lah. L. J. 475 A. I. R. 19-3 Lah. 95 *Lakhma Das v. Mehr Chand* 73 Ind. Cas. 910, A. I. R. 1923 Lah. 144 Where the only reason for delay in filing an appeal was that certain necessary papers were given to a counsel who took no steps for filing the appeal and returned them after the period of limitation had expired, and it was not shown that the appellant took any steps to engage the services of another pleader before the expiry of the period of limitation it was held that there was no sufficient cause for the delay—*Dewan v. Buddha* 12 A. L. J. 837, 25 Ind. Cas. 30 Where the appeal was filed late on account of the delay in getting copies and the delay was due to the fact that the appellant gave money to the pleader's clerk for getting the copies but afterwards took no steps to enquire of his pleader for the same held that there was no sufficient cause to excuse the delay—*Mahatab v. Birkmo*, 21 A. L. J. 817, 75 Ind. Cas. 254

An appellant who has waited for applying to obtain the necessary copies up to the last day of limitation when the Court happened to be closed for some holiday, and who was consequently obliged to apply for them after the period for appeal had expired, is not entitled to get either the indulgence under this section or the benefit of section 12—*Guran v. Hindaban*, 79 P. R. 1916 After the arguments in a case were concluded, but before judgment was pronounced, the defendant died. The case was decided against the defendant. His sons one of whom was an adult and the other a minor represented by his mother as guardian, presented an appeal 15 days beyond time. It was held that there was no sufficient reason to extend the delay, in as much as the adult son (who was an educated young man) and the mother (who was well able to manage her affairs) who were concerned to prosecute the litigation in their own interests and in the interests of the infant, were grossly negligent, remiss and careless in not prosecuting the appeal in time—*Ganesh v. Sitarani*, 41 Bom. 15

When the defendant died in 1918, and the plaintiff applied to have the name of the legal representative of the defendant placed on the record two years after, on the ground that he was ignorant of the defendant's death, held that the plaintiff had failed to show sufficient cause for the delay, for if he had shown the smallest diligence in prosecuting the suit, he must have discovered the fact of the defendant's death much earlier—*Sarat Chandra v. Mashar Stone and Lime Co. Ltd.*, 49 Cal. 62 (at p. 66) Where the clear provisions of the Court Fees Act were brought to the notice of the party's counsel, and he was asked to make up the deficient Court Fees, but the counsel and the party were both grossly negligent in not paying the deficit Court fees within the period of limitation held that they were not entitled to any extension of time—*Puran Chand v. Emp.*, 27 P. L. R. 91, 92 Ind. Cas. 991

Where the appellants relied upon an unauthorised publication known as the 'Legal Diary' and being misled by it as to the duration of the Chief Court's vacation presented his appeal beyond the period of limitat

it was held that the cause shown was not sufficient as the appellant had not acted with due care and attention—*Jai Dyal v Amar* 1917 P W R 27

66 Negligence of agents or servants —Negligence of servants is not a sufficient cause. If parties choose to entrust legal affairs (e.g. filing of appeal) to their servants they must take the consequences of any remissness or negligence which may be exhibited on the part of their servants and they cannot come to Court after the period of limitation and claim indulgence under this section—*Seth Jahar v Prichard* 4 P L J 381 57 Ind Cas 225 *Jaleswar v Ram Hari* 55 Ind Cas 17 (Patna) *Mg Naw v Somasundaram* 2 Rang 655 A I R 1925 Rang 187

Where an appellant entrusted all business connected with the filing of his appeal to an unqualified man who made no attempt to take professional advice which if taken would have avoided the delay in the presentation of the appeal held that it was not a sufficient cause under this section—*Krishnaswami v Ramaswami* 19 M L J 209

67 Notice of delivery of judgment, not given to parties —An application for extension of time for appeal was made on the ground that though arguments were heard on the 15th March judgment was not delivered until 17th April and no notice of the delivery of judgment was given to the parties and it was not until July that the applicant heard that judgment had been delivered. Held that in the absence of any indication to the contrary it must be presumed that the notice required under O 20 Rule 1 C P Code was given. The application was refused—*Habibullah v Benarsi Das* 22 O C 379 55 Ind Cas 837 But in *Ma Me Thin v Maung San Lun* 8 Bur L T 99 no such presumption was made, and the negligence of the Court in not giving notice of delivery of judgment was held to be a sufficient cause for extension of time for the appeal

68 Other cases —The fact that the appellant had preferred an appeal in a connected case and awaited its result does not entitle him to an extension of time under this section—*Dund v Deonandan* 17 C L J 596 70 Ind Cas 513 *Husaini Begum v Collector* 9 All 11 (per Mahmud J) The fact that a person was not aware of a change of rule which had been given ample publicity is no ground for excusing delay—*Gopal v Wallabhdas* 75 Ind Cas 878 (Nag) Two suits were brought at the same time by the executors raising some questions of construction in respect of the same will. Similar decisions were passed in both the suits. On appeal by a defendant in one suit the decree of the Court of first instance was reversed. Thereupon the plaintiffs applied for leave to appeal in the second suit although the time limited for appealing had expired. The Court held that no sufficient cause was shown for the plaintiffs delay the decision in one suit would not abide by the decision of the other as the suits were independent of each other—*Thucker v Canji* 14 Bom 365

On the failure of an application to set aside an *ex parte* decree the period occupied in the proceeding cannot be deducted in computing the period of limitation for an appeal against the decree. The petitioner having failed in his application could not be allowed to fall back upon the remedy by way of appeal which was open to him at the time when the decree was passed and of which he did not choose to avail himself, and that was not a sufficient cause under this section—*Ardha v. Malangini*, 23 Cal 325

If the delay be caused by the appellant's desire to file his appeal on a 'lucky day' held that that would be no sufficient cause—*Achilappa v. Ramanujan* 25 Mad 166 (177)

The goodness or otherwise of a case, and a mistake in calculating the time allowed for an appeal do not in themselves constitute a sufficient cause—*Gkarib v. Poklo Mal*, 92 P R 1886

The plaintiff brought a suit for partition and possession of his share against his co-sharer Z as well as the vendees of the co-sharer. The first Court gave him a decree. Two appeals (Nos 19 and 20) were filed against that decree, one (No 20) by Z, and the other (No 19) by the vendees. The lower Appellate Court accepted the appeals, dismissed the plaintiff's suit, and passed two connected judgments (one of which referred to the other) and two decrees. The plaintiff preferred a second appeal to the High Court, and filed copies of judgment and decree of Appeal No 20, but did not file a copy of decree in Appeal No 19. On preliminary objection by the respondents the appellant prayed for time for filing the copy of the decree in Appeal No 19. Held that no sufficient cause has been shown for extending the time for filing the copy—*Muhammad Din v. Zebunnissa*, 3 Lah 215

The applicant presented an application for review but the Munsarim declared that it was insufficiently stamped. Thereupon a dispute arose between the party and the Munsarim as to whether or not the stamp was sufficient. Afterwards the deficiency in stamps was paid but after the period of limitation. Held that there was no sufficient cause for excusing the delay in filing a properly stamped application for review. The deficiency should have been made good as soon as the Munsarim pointed it out—*Munro v. Cawnpore Municipal Board*, 12 All 57

MISCELLANEOUS —

69 Withdrawal of appeal—Cross objection.—The withdrawal of an appeal, by which the respondent lost opportunity under the old Civil Procedure Code of having his cross objection heard, afforded no sufficient reason for enlarging the time for his preferring a regular appeal as regards his cross-objection—*Chudasam v. Ishwargar*, 16 Bom 249, *Jafar v. Ranjit*, 17 All 518, but where it appeared that the respondents would have appealed but for the fact that an appeal by the appellant was already on the file, it was held that the respondents showed sufficient cause for

filing their appeal within time—*Hargovindas v Jadavahoo*, 23 Bom 692, *Gour Hari v Premnath*, 9 Cal 738

But now the new Civil Procedure Code (1908) O XLJ, r 22 (4) provides that if the original appeal is withdrawn or dismissed for default, the memorandum of objections filed by the respondents may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit. Even where the cross objections filed by one party were dismissed, without going into the merits of the case, on the ground of their being filed after the dismissal of the appeal, and an appeal was filed on the same points as the cross objections it was held that this appeal was not barred—*Parbhu Dayal v Murlidhar* 22 A L J 365 A 1 R 1925 All 867, 78 Ind Cas 677

70 Admission of time-barred appeal subject to objections at the hearing.—An *ex parte* order admitting a time barred appeal is subject to re consideration at the hearing of the appeal at the respondent's instance—*Krishnasami v Ramaswami* 41 Mad 412 (P C) affirming 23 M L J 219, *Moshauilla v Ahmedulla*, 13 Cal 78 *Sarat Chandra v Saraswati*, 34 Cal 216 *Dund Bahadur v Deonandan*, 17 C L J 506, *Saku v Maroti*, 8 N L R 30 *Mallu Reddy v Beddakha* 27 M L J 147 *Venkatrayudu v Nagadu* 9 Mad 450 *Ravi Keshav v Krishna Rao* 38 Bom 613, *Mulna Ahmad v Krishnaji Ganesh*, 14 Bom 594. The *ex parte* order may be reconsidered either by the Court which admitted the appeal or by the Court to which the appeal has been transferred—*Wahid v Hagdod*, 1897 A W N 15 *Chunder Dass v Boshoon Lal*, 8 Cal 251, *Krishna v Subraya*, 21 Mad 228 *Mulna v Krishnaji*, 14 Bom 594. A Division Bench of the High Court hearing an appeal is competent to set aside an *ex parte* order of a single Judge of the High Court admitting an appeal beyond time—*Hustain Begum v Collector*, 9 All 11, *Umud Ali v Municipal Committee* 2 Lab 1 *Krishnasami v Ramasami*, 41 Mad 412 at p 416 (P C)

In the Privy Council case cited above (41 Mad 412) their Lordships of the Judicial Committee, while holding that an *ex parte* order admitting a time barred appeal is open to reconsideration at the respondent's instance, yet observed that the question of limitation should not however be left open till the hearing of the appeal, although this has been hitherto the usage in India. The Indian Courts should adopt a procedure which will secure at the stage of admission the final determination of any question of limitation affecting the competency of an appeal. This view has also been expressed in *Shrimant Sundarabai v Collector*, 43 Bom 376 (P C). See the cases cited under heading 'Admitting time barred appeal subject to objections' in sec 3

So, when an application is made to the Court for an extension of time for presentation of an appeal under this section, a rule should be issued on the respondent to show cause why an extension of time should not be

granted—*Elaki Venk v. Bireswar* 79 Ind Cas 924 A I R 1925 Cal 175 This procedure has been insisted upon by their Lordship of the Judicial Committee in 41 Mad 412 cited above Where an appeal which was filed out of time was admitted subject to objections, but the respondent was not made aware of the order and no question was raised as to the legality or propriety of the order and the appeal was allowed on the merits by the lower Appellate Court *held* that the admission of the appeal subject to objections by the Lower Appellate Court was irregular and the respondent could raise the question of limitation in second appeal—*Abdul Karem v. Chaturbhuj* 3 P I T 110 64 Ind Cas 55 A I R 1922 Pat 47 If an appeal presented out of time is admitted by the appellate Court *ex parte* the respondent as soon as he is served with notice of the appeal may apply by motion for dismissal of the appeal on the ground of delay If the respondent sleeps over his right and allows the appellant to incur expenses in bringing the case for hearing he cannot be allowed at the hearing of the appeal to raise a preliminary objection that the appeal is time barred—*Murugappa v. Thyammal* 31 M L T 456 70 Ind Cas 87 A I R 1923 Mad 82

Where a Judge excused the delay in the filing of an appeal without notice to the respondent and when the appeal came on for hearing the latter did not object to the order in the course of his argument the final decision in the appeal cannot be attacked in revision on the ground of delay in filing the appeal—*Bharat v. Basant* 80 Ind Cas 617 A I R 1925 Oudh 148

Where an application for the admission of an appeal which was filed out of time by 2 days was heard *ex parte* before a Division Bench of the High Court and admitted it was held that though the order was not conclusive on the respondent and he was entitled to object to the admission of the appeal at a later stage the order of the Division Bench admitting the appeal should not be discharged when no facts which were not before the Bench were urged on behalf of the respondent—*Bishen Dat v. Nandan* 12 C W N 25 *Sahu v. Maroti* 8 N I R 50 15 Ind Cas 562

It was held in *Jhotee v. Omes* 5 Cal 1 that if the District Judge being satisfied that the appellant had sufficient cause for not being able to file an appeal within time admitted it a Subordinate Judge to whom the appeal had been transferred for disposal could not cancel the order But it has been held in later decisions that this view is not correct because even if the District Judge upon the representation of the appellant be satisfied that there was sufficient cause yet the other side would be at liberty at the hearing of the appeal either before the District Judge or before the Subordinate Judge (if the appeal is transferred to the latter) to show that in fact the representation of the appellant was not true that really there was no sufficient cause for admitting the appeal bey

time—*Mulna v Krishnaji* 14 Bom 594 *Bhismadeo v Sitanath*, 40 Cal 259 *Manick v Naibulla* 2 C W N 461

71 Interference by High Court —The High Court has power in second appeal to look into the grounds upon which the Lower Appellate Court has admitted an appeal beyond time—*Chunder Dass v Boshoon Lall* 8 Cal 251 It is the duty of the second Appellate Court to see whether the duty cast upon the Judge of the Lower Appellate Court as regards determination of the question whether the appeal is within limitation has been properly discharged by him and to interfere if by a wrong improper and judicially unsound exercise of discretion under this section he has admitted an appeal which was barred by limitation—*Becht v Ahsanullah* 12 All 461 (483)

Where the discretion is exercised in a capricious or arbitrary manner the High Court can interfere—*Bhimrao v Ayyappa* 31 Bom 33 *Joti Prasad v Chuni Lal* 106 P R 1885 *Gharib v Pohlo* 92 P R 1886 *Parvati v Gaipati* 23 Bom 513 Thus where the appeal to the lower Appellate Court had been presented beyond time but of the several appellants one only applied to have the delay excused on grounds personal to himself with the result that the lower Appellate Court admitted the appeal of all the appellants and varied the decree of the first Court the High Court interfered and reversed the lower Appellate Court's decree because there was no sufficient cause on which the delay of *all* the appellants could be excused—*Vishwanath v Vasudev* 25 Bom 699 Where the lower Court has exercised its discretion under this section on the strength of a misleading report and had set up a rigid law of limitation in the exercise of that discretion the High Court will interfere—*Narain Singh v Bikaram* 8 A L J 793 11 Ind Cas 814 Where a Judge who purports to exercise the discretion under this section does so under the view that there is no general rule when in fact there is one he has misdirected himself as to the law to be applied to the case he has not exercised a judicial discretion and the superior Court must either remit the case or exercise the discretion itself—*Brij Inder Singh v Kanshi Ram* 45 Cal 94 (P C) Where the Lower Appellate Court has failed to exercise its discretion according to this section and has not considered the question whether there was sufficient cause for extending the period the High Court may interfere and consider the question in second appeal and if necessary allow a time barred appeal—*Gharib v Pollo Mal* 92 P R 1886 *Nand Singh v Gullu* 77 P R 1917 *Sripal v Hubbard* 2 O W N 678 A I R 1925 Oudh 643

But where the Lower Court after considering all the circumstances of the case has exercised its discretion one way or the other and has come to the conclusion that sufficient cause has or has not been established for not filing an appeal within time the High Court in second appeal will not interfere—*Debi Charan v Sheikh Melhi*, 20 C W N 1303 1 P L J

485 *Fahima v Hansi* 9 All 244 *Hardhan v Mam Chand* 92 P R 1916 *Tulsa Kunwar v Gajraj* 25 All 71 *Hamid Ali v Gayadin* 26 All 327 *Sripal v Hubdar* (supra) *Abdul Kasim v Chaturbhuj* 6 P L J 444 64 Ind Cas 55 *Ram Rup v Naik Ram v I R* 1906 All 25.

A mere difference in view as to the mode in which the discretion ought to have been exercised under this section by the Lower Appellate Court is in itself no ground for interference by the High Court but where facts which are material for the purpose of enabling the Lower Appellate Court to exercise the discretion under this section have not been considered the exercise of discretion is judicially unsound and the High Court can interfere—*Kichilappa v Ramanujam* 25 Mad 166 *Hardhan v Mam Chand* 9 P R 1916 Before the High Court interferes it ought to be satisfied that the exercise of the discretion by the lower Court was judicially unsound. The test is has the discretion been exercised after appreciation and consideration of all the facts which are material for the purpose of enabling the Judge to exercise a judicial discretion and after the application of the right principle to these facts?—*Kichilappa v Ramanujam* 25 Mad 166 Where the Lower Appellate Court has in the exercise of its judicial discretion refused to excuse the delay in the presentation of an appeal the High Court would not interfere in second appeal with the exercise of that discretion even though it might have taken another view had it been the Lower Appellate Court—*Ahmad Hussain v Fasihullah* 45 All 43 21 A L J 319 A I R 1923 All 455 In a recent Madras case where the Lower Appellate Court had admitted a time barred criminal appeal and acquitted the accused without being satisfied that the appellant had sufficient cause for not preferring the appeal in time but there had been no gross miscarriage of justice which ought to be remedied the High Court refused to interfere—*Janakiramayya v Brahmayya* 48 M L J 457 A I R 1925 Mad 709

72 Explanation —An appellant who is misled by a practice which had hitherto prevailed in the subordinate Court but which had recently been held to be wrong is entitled to an extension of time under this section—*Ram Charita v Ram Narayan* 50 Ind Cas 959 (Patna) *Nisaran v Martin and Co* 32 C L J 127 *Jotindra v Lodna Colliery Co* 6 P L J 350 (F B) Where the appellant has been misled by the rules of the Court followed for a long time the provisions of this section can be invoked—*Bheemasena v Venugopal* 48 Mad 631 48 M L J 384 A I R 1925 Mad 725

Where the applicant was misled by a Full Bench judgment into an erroneous belief and thereby made a wrong calculation of the period of limitation for his application held that there was sufficient cause for the delay in filing his application—*Harish Chandra v Clandpur Co Ltd* 39 Cal 766 (773)

6 (1) Where a person entitled to institute a suit or make an application for the execution of a decree is at the time from which the period of limitation is to be reckoned a minor, or insane, or an idiot, he may institute the suit or make the application within the same period after the disability has ceased, as would otherwise have been allowed from the time prescribed therefor in the third column of the first schedule

(2) Where such person is, at the time from which the period of limitation is to be reckoned, affected by two such disabilities, or where, before his disability has ceased, he is affected by another disability, he may institute the suit or make the application within the same period, after both disabilities have ceased, as would otherwise have been allowed from the time so prescribed

(3) Where the disability continues up to the death of such person his legal representative may institute the suit or make the application within the same period after the death as would otherwise have been allowed from the time so prescribed.

(4) Where such representative is at the date of the death affected by any such disability, the rules contained in subsections (1) and (2) shall apply

Illustrations.

(a) The right to sue for the hire of a boat accrues to A during his minority. He attains majority four years after such accrues. He may institute his suit at any time within three years from the date of his attaining majority

(b) A right to sue accrues to Z during his minority. After the accrues, but while Z is still a minor, he becomes insane. Time runs against Z from the date when his insanity and minority cease

(c) A right to sue accrues to X during his minority. X dies before attaining majority, and is succeeded by Y, his minor son. Time runs against Y from the date of his attaining majority.

73 Principle — The rights of infants are much favoured in law, and regularly their laches shall not be prejudicial to them upon a presumption that they understand not their right and that they are not capable of taking notice of the rules of law so as to be able to apply them

to their advantage. Hence by the common law infants were not bound for want of claim and entry within a year and a day nor are they bound by a fine and five years non claim nor by statutes of limitation provided they prosecute their right within the time allowed by the statute after the impediment is removed.—Bacon's Abridgment cited in 37 Mad 186 (at p. 190). The general principle of law is that time does not run against a minor—*Mora v. Esaji* 16 Bom 536.

74 Scope of Section.—Sec 7 of the old Act applied to the case of a person entitled to make any application but now this section has been limited to the case of a person entitled to make only an application for the execution of a decree.

But a right preserved by the old Act will not be taken away by the new one. Thus under the Act of 1877 the minor judgment debtor could on attaining majority apply to set aside a sale. If such right accrued to a minor before the Limitation Act of 1908 came into force it cannot be taken away by the present Act that being a privilege which has been preserved by sec 6 (c) of the General Clauses Act—*Fazal Karim v. Annada* 14 C W N 845 11 Ind Cas 401.

This section will not grant an indulgence to a minor entitled to prefer an appeal. It provides only for suits or applications for execution of decrees. An application to file an award does not become a suit by the provision of para 10 (2) of Schedule II of the C P Code and hence the applicant cannot claim the benefit of this section—*Ma Thein Tin v. Maung Ba Than* 1 Rang 256.

Again this section is limited to applications for execution of decrees. It is not applicable to an application under O XXII r 1 C P Code for lifting the legal representatives of a deceased appellant on record nor to an application to set aside an order of abatement—*Ma Win Thing v. Maung Po Win* 10 Bur L T 27 35 Ind Cas 438. It does not apply to applications for setting aside *ex parte* decrees—*Chidambaram v. Karuppan* 35 Mad 678 8 Ind Cas 543. *Manohar v. Sadiga* 101 P R 1916 37 Ind Cas 292. Nor does it apply to an application for the re-admission of an appeal under O 41 rule 19 of the C P Code—*Sonubai v. Shwayi Rao* 45 Bom 648 23 Bom L R 110 60 Ind Cas 919.

An application for restitution under section 144 C P Code is virtually an application for execution of the appellate decree amending the decree of the first Court and therefore falls within the purview of this section. This is an enabling section to enable persons under disability to exercise their legal rights within a certain time and it should not be construed so narrowly as to exclude an application for restitution—*Kurgodigouda v. Ningangouda* 41 Bom 625 19 Bom L R 638. *Sant Salai v. Chhulai* 3 O W N 65 92 Ind Cas 23 A I R 1926 Oudh 199. But an application for a final decree in a mortgage suit is an application in the suit and is not a application for execution and is not governed by this section—

Vinayakrao v Baijnath 15 N L R 36 48 Ind Cas 934 *Nizamuddin v Bohra Bhimsen* 40 All 203 (205) 16 A L J 85 48 Ind Cas 870

75 Application of the Section —This section applies only to cases dealt with by the Act itself : *e* to those suits and applications for execution of decrees which are mentioned in the First Schedule. It is not applicable to cases for which a period of limitation is prescribed by other Acts. Thus the provisions of this section do not apply to a case where a decree is barred by section 48 of the Civil Procedure Code 1908—*Ram Nath v Chatarpal* 37 All 638 13 A L J 826 *Chatarpalman v Prem Nath* 13 A L J 166 27 Ind Cas 865 *Ramana Reddi v Babu Reddi* 37 Mad 186 24 M L J 96 18 Ind Cas 586 *Thandu v Mohan Lal* 1894 P R 128 nor do the provisions of this section apply to suits instituted under the Indian Registration Act—*Veeramma v Abbiah* 18 Mad 99 or Bengal Rent Act VIII of 1869—*Girija Nath v Patani* 17 Cal 763 or under Act IX of 1859—*Mahomed v Collector* 13 B L R 292 nor to a suit under the Bengal Tenancy Act—*Akhoy Kumar v Bijoy Chand* 29 Cal 813

The Bombay High Court holds that though section 6 of the Limitation Act applies only to cases dealt with by the Act itself and as such does not apply to cases under the Civil Procedure Code still the provisions of the Civil Procedure Code must be deemed to be subject to the general principle of law as to the disabilities of minors viz that time does not run against a minor. Therefore an application for execution though barred under sec 48 C P Code is in time if made within three years after the minor attains majority—*Moro v Issaji* 16 Bom 536. But this case has been dissented from in 37 All 638 37 Mad 186 and 1894 P R 128 cited above.

This section applies only to cases in which a period of limitation has been prescribed by law and not to the case of an order made by a Court for the payment of money by a certain time—*Prema v Jauahir* 31 P R 1884

76 Meaning of the Section —It is clear from the provisions of this section that minority or lunacy would not prevent limitation from running as against the minor or lunatic but it simply gives to the minor or lunatic an extended period for filing a suit or an application. A lunatic's wife improperly sold his lands to the defendants in 1880. In 1882 the lunatic died and his widow who succeeded him as heir died in 1910. In a suit brought by the reversioners in 1917 for the recovery of the lands it was contended on their behalf that the possession of the defendants could not be adverse to the lunatic that upon his death it was adverse to his widow but not to the reversioners and that the suit was therefore in time. Held (overruling the contention) that adverse possession began in 1880 from the date of the sale-deed in the lunatic's life time that a suit to recover possession ought to have been brought within twelve years from

that date (although the lunatic, had he lived and become sane would have been entitled to bring a suit within 3 years from the time when his disability ceased), and that the present suit was barred by limitation—*Seeta ramaraju v Subbaraju*, 45 Mad 361, 42 M L J 262, A I R 1922 Mad 12

In computing the period of limitation for a minor, the date on which he attains majority must be excluded from calculation—*Jugmohun v Luckmeshur*, 10 Cal 748 (751)

77. Person suing in representative capacity —The benefit of this section applies to the case of a person suing in a representative capacity, e.g., a *shebait* of an idol. The right of suit is vested in the *shebait*, not in the idol therefore if at the time when the cause of action for a suit for recovery of possession of property dedicated to an idol accrued, the *shebait* was a minor, he could bring such suit within three years after attaining majority—*Jagadindra v Hemanta*, 3 Cal 129 141 (P. C.), 8 C. W. N 809.

78. Accrual of cause of action —The plaintiff must be a minor (or insane etc.) when the cause of action first accrued and the cause of action must have accrued to the minor *himself* otherwise he cannot claim any exemption under this section. Therefore if the cause of action accrued to the minor's father, the minor son cannot after his father's death wait till he attains majority—*Nusheeram v Shushee* 5 W R 169 *Vira v Muruga*, 2 M H C R 340. Similarly if the cause of action accrued before his birth, the minor cannot, on coming of age, avail himself of the benefit of this section—*Siddheswar v Sham Chand*, 23 W R 285 *Aehr v Hazara*, 173 P W R 1912, 14 Ind Cas 60 *Lachman Das v Sundar Das* 1 Lah 558, 59 Ind Cas 678. Thus where a coparcenary property was alienated by all the adult male members living at the time and the plaintiffs who were born after the date of the alienation brought a suit to challenge the sale within three years after attaining majority held that this section could not be pleaded by a plaintiff who was not in existence when the cause of action accrued (i.e., when the alienee took possession, Art 126). He is entitled to take advantage of an existing cause of action so long as it subsists, but he does not obtain a fresh period of 21 years (18 years and 3 years) from the date of his birth—*Dhanraj v Ram Naresh*, A I R 1924 All 912, 79 Ind Cas 1019 *Thakur Prasad v Gulab*, 87 Ind Cas 662 *Ram Kishen v Buldeo* 86 Ind Cas 704, A I R 1925 All 247. This view is now fortified by the Privy Council decision in *Ranodip v Parameshwar*, 47 All 165, 29 C W N 666, 27 Bom L R 175 23 A L J 176, 48 M L J 29, 86 Ind Cas 249, A I R 1925 P C 33.

But the law is otherwise in the case of reversioners. One reversioner does not derive his title through another and the cause of action accrues to one reversioner independently of others. Therefore where a nearer reversioner has neglected to sue for a declaration that an alienation made by the widow is not binding on the estate, and has therefore allowed the

claim to be barred, a more remote reversioner who was born after the date of the alienation, or who was a minor at the date of the alienation, is not precluded from claiming the benefit of this section, for although the cause of action to the nearer reversioner accrued from the date of alienation still to him (the remoter reversioner) it accrued when he was born or when he was a minor, and not before, and he can enforce his right after he attains majority—*Abinash v Harinath*, 32 Cal 62 at page 71, *Bhagwanta v Sukhi*, 22 All 33 (F B), *Das Ram v Tirika Nath*, 51 Cal 101 (108) This was also the view of the Madras High Court in *Govinda v. Thayammal* 28 Mad 57 *Veerayya v Gangamma*, 36 Mad 570, *Narayana v Rama*, 38 Mad 396, and *Venkata Row v Tulja Ram Row*, (1917) M W N 30 but all these cases have now been overruled by the Full Bench decision in *Varanma v Gopaladasayya*, 41 Mad 659 (See this case cited in Note 526 under Art 125) In this case it has been held that if the reversioners existing at the time of alienation are barred, the reversioners born thereafter are equally barred, as the cause of action is but one The Lahore High Court likewise holds (following 41 Mad 659) that the right to sue for a declaratory decree is vested in the whole body of reversioners in existence at the time of alienation jointly and severally, and time begins to run simultaneously against them all, and a reversioner born after the date of alienation does not obtain a fresh cause of action from his birth because when the time has once begun to run, no subsequent disability stops it—*Chiragh Din v Abdulla*, 6 Lah 405, 90 Ind Cas 1022, A I R 1925 Lah 654, *Mohan v Dewa Singh*, 21 P W R 1907 *Umra v Ghulam*, 22 P. R 1907

Where the cause of action accrued to the guardian, the minor cannot on attaining majority claim the benefit of this section Thus, a promissory note was given to the guardian of the plaintiff when the latter was a minor in 1906 The plaintiff attained majority in 1919 and sued on the note within three years therefrom Held that the suit was barred The pro note having been given to the guardian he was the person entitled to sue on it, and the suit would be barred if it was not brought within the ordinary period of limitation The minor was not entitled to institute a suit on the note—*Lishnu v Keshav*, 26 Bom L R 426, A I R 1924 Bom 468, 80 Ind Cas 474

79 Adopted son —The cause of action for a son adopted by a Hindu widow accrues from the time when he is adopted If he is a minor at the time of adoption, he is entitled to the benefit of this section Where a cause of action accrued to a minor Hindu widow who adopted a son during the continuance of her minority, the adopted son (a minor) in bringing a suit, when no suit had been brought by the widow, is entitled to the benefit of this section—*Harch v Brijy*, 9 C W. N 745

80 Minor —'Minor' means a person who has not attained the age of majority under the Indian Majority Act. Section 3 of that Act lays

down * Every minor of whose person or property a guardian has been or shall be appointed by any Court of Justice and every minor under the jurisdiction of any Court of Wards shall be deemed to have attained his majority when he shall have completed the age of twenty-one years and not before every other person shall be deemed to have attained his majority when he shall have completed the age of eighteen years and not before

If the minor claims the benefit of this section it is for him to establish affirmatively and clearly that he is under the age of 21 (18+3 years under sec 8) at the time of institution of the suit it is not enough merely to show that he is *probably* under that age at the time—*Charanjit v Bishen Singh* 167 P L R 1914 23 Ind Cas 46 See also *Panchu Mandal v Sheikh Isak* 17 C W N 667 18 Ind Cas 391 *Prem Das v Sarbanand* A I R 1923 Lah 41

A person who is of full age but whose property is under the Court of Wards cannot take the benefit of this section—*Uma Kanta v Hiralal* 10 C W N 85

An idol is not a perpetual minor for the purpose of this section and so it is not correct to say that a suit by an idol to set aside an improper alienation made by the shebait would be for ever saved from the bar of limitation under the provisions of this section Therefore where the manager of the temple alienated the property of the idol in 1905 a suit brought in 1918 to avoid the transfer was barred—*Chitar Mal v Panchu Lal* 4 A L J 351 93 Ind Cas 652 A I R 1926 All 392

81 Assignees of minor —This section gives only a *personal* privilege to the minor it applies to the minor himself or his legal representatives but not to his assignees—*Rudra Kari v Nobokishore* 9 Cal 663 (F B) *Bhagaban v Ishan* 22 C W N 831 46 Ind Cas 802 *Mahadev v Babi* 26 Bom 730 *Imam uddin v Mumia unniisa* 18 O C 34 1 O L J 747 7 Ind Cas 118 *Mahomed Nur Khan v Lachmi Naran* 9 O L J 88 A I R 1922 Oudh 31 *Huham v Skalab* 1918 P W R 14 44 Ind Cas 890 *Rangaswami v Tlangavel* 4 Mad 637 *Silla Bux v Ram Neua* 2 O W N 811 A I R 1926 Oudh 20 90 Ind Cas 741 Therefore where a person sues to set aside a transfer effected by his father during his minority within three years of his attaining majority and joins with him as co plaintiff an assignee to whom he sells a portion of the property in suit that person may be in time by making use of sec 6 but his co plaintiff being only an assignee is not entitled to its privilege and is beyond time—*Silla Bux v Ram Newaz* (supra)

82 May institute a suit —The benefit of this section is not absolute the plaintiff or applicant labouring under the disability is not bound to wait till the disability ceases he has the option either to take proceedings through his guardian or next friend or to wait until the expiration of the period of his minority Even if during his minority he makes applications

for execution through his guardian he is not precluded from making applications himself after attaining majority—*Mon Mohun v Ganga Soondery* 9 Cal 181 *Moro v Visaji* 16 Bom 536 *Jaggiwal v Hasan* 7 Bom 179 *Zahir Hassan v Sundar* 22 All 199 (F B) *Guneswar v Jagadlatri* 3 C W N 74 Similarly the fact that a guardian or next friend might have maintained a suit on behalf of a minor does not take away from the minor the privilege of this section—*Jagadindra v Hemanta* 37 Cal 129 (P C) *Jagat Narain v Narbada* 16 O C 706

83 Suit by guardian during ward's minority —The privilege given to a minor is not one that could be availed of by him only after he comes of age Any application or act made or done by his guardian on his behalf during his minority is equally exempt from the operation of limitation—*Narendra v Bhupendra* 23 Cal 374 at page 388 Therefore while the minor's disability lasts his guardian or next friend can bring a suit or make an application even though the ordinary period of limitation for such suit or application has run out—*Phoolbas v Lalla Jogeshwar* 1 Cal 26 (P C)

Acknowledgment made to a minor —See *Venkatarangaswar v Kollai daramayyar* 13 Mad 135 cited under sec 19

84 Insanity—Lucid Interval —When insanity is once proved to have existed it is presumed to continue until it is proved to have ceased and a very strict burden of proof lies on the party who alleges recovery —*Pope on Lunacy* 2nd Edn p 408

A lucid interval is a temporary cessation of lunacy and it cannot be treated as a recovery unless it is of sufficient length of time to enable the person to do an intended rational act—*Cartwright v Cartwright* 1 Phillim 90 (100)

85 Other disqualifications —Under the Limitation Act no other disqualification than those mentioned in the Act can save limitation and the only disqualifications that sections 6 8 and 9 of the Act recognise are minority idiocy and lunacy A disqualification under the Court of Wards Act is not such a legal disability as is recognised and enumerated in the Act and the fact that the plaintiff was a disqualified proprietor whose estate was under the charge of the Court of Wards is not a ground for extension of the period under this section—*Kuarmani v Basif* 19 C W N 1193 *Rani Kuar Mani v Nawab of Murshidabad* 46 Cal 694 (P C) 23 C W N 531 50 Ind Cas 202 *Umakanta v Hira Lal* 70 C W N 852

The fact that an adopted son on attaining his majority had to sue to establish his adoption is not a disability and he cannot be allowed the time which was occupied in establishing his rights Although his rights were disputed he still could have sued in the meantime to recover property which devolved on him by virtue of his adoption—*Muldon Mohun v Nund Ashore* 5 W R 795

A reversioner's disability to sue for possession while a Hindu female is the owner in possession of the estate is not treated by the Legislature on the same footing as the disability of a minor, an idiot or an insane person, and no extra period can be allowed from the time when he succeeds to the estate—*Sesha Aaidu v. Periasamy* 44 Mad 951 (952)

85A Subsection (2) —Where several disabilities co-exist concurrently in the plaintiff the time does not commence to run against him till all have ceased—*Stuart v. Mellish* (174) 2 Atk 610. If the plaintiff is under one disability at the time the action accrues and afterwards (and while the first disability continues) he comes under another disability the time will not commence to run till the last of the disabilities has ceased—*Borrows v. Ellison* (1871) L. R. 6 15 1-5.

Subsection (3) —Reading subsection (3) of this section with section 8 the conclusion is that in a suit for possession where a minor dies before attaining majority his representatives would have either the total period of 12 years from the date of accrual of the cause of action or three years from the date of the minor's death whichever is greater. Thus a minor died in 1910 the cause of action for a suit for possession had accrued to the minor in January 1909 the 12 years period from this date expired in January 1921. The period between 1910 and January 1921 being more than three years the legal representative would be entitled to sue within January 1921. If the legal representative was himself a minor, the rule in subsection (4) would apply—*Anantoo v. Ramrup* 87 Ind. Cas 315 A 1 R 19 5 All 69. Under subsection (4) an extension of limitation in favour of one person may be tacked on to an extension in favour of a second person only where the first person dies while still under a disability and the second person is his legal representative who is also under a disability at the time of the first person's death—*Lachman Das v. Sundar Das* 1 Lah 558 59 Ind. Cas 678.

7 Where one of several persons jointly entitled to institute a suit or make an application for the execution of a decree is under any such disability and a discharge can be given without the concurrence of such person time will run against them all, but, where no such discharge can be given, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others or until the disability has ceased.

Illustrations

(a) A incurs a debt to a firm of which B, C and D are partners. B is insane, and C is a minor. D can give a discharge.

of the debt without the concurrence of B and C. Time runs against B, C and D.

(b) A incurs a debt to a firm of which E, F and G are partners. E and F are insane, and G is a minor. Time will not run against any of them until either E or F becomes sane, or G attains majority.

This section corresponds to section 8 of the old Act.

86. Sections 6 and 7.—Sections 6 and 7 are not mutually exclusive, the latter section supplements the former—*Rati Ram v Niadar*, 41 All 435 (441), 17 A L J 649. In other words, the right which the previous section gives to a minor (viz to wait till he attains majority) can be availed of by him only if the circumstances mentioned in the first portion of the present section do not exist that is, if there is nobody to give a valid discharge on his behalf without his concurrence. If however a discharge can be given without his concurrence, he cannot take advantage of his minority and wait till he becomes a major.

The combined effect of sections 6 and 7, in cases in which a right of suit resides jointly in a plurality of persons is that where any one of such joint creditors or claimants is under a disability and a full discharge can be given without his concurrence by all or any of the others, the suit on the claim will be governed by the ordinary law of limitation, and time will run against all but where no such discharge can be given, time will not run against any of them until all have ceased to be under disability. In the result, such a suit cannot be barred in part in respect of some of the joint claimants and not-barred in part at the same time in respect of the others—*Ahinsa Bibi v Abdul Kader*, 25 Mad 26.

87. Joint right.—This section speaks of a 'joint' right, and has no application where the plaintiffs are severally entitled to the right. Where several persons jointly entitled to a certain property are dispossessed and a suit is brought for the recovery of possession, this section has no application to the case, if each individual plaintiff is entitled to bring the suit for possession of his individual share—*Rakhal Chandra v Mohendra*, 51 Ind Cas 797 (Cal). Again the kind of joint right contemplated in this section is the joint substantive right, the same identical substantive right belonging to several individuals. Persons whose rights are distinct and different but who are permitted to enforce such separate rights by one judicial process to which all are parties, or by a process instituted by one on behalf of all are not comprehended by this section—*Johnson v The Madras Ry Co*, 28 Mad 479, *Harikar v Bhoji*, 6 C L J 383. Thus the mere fact that a person suing for himself and praying for one particular remedy (setting aside a sale-deed) could have joined in the same suit another cause of action (claim for possession) vested in another person for

whom the former could have acted as next friend, would not bring such a suit within the ambit of section 7 which contemplates the existence of a joint cause of action in support of a single suit—*Kandasami v Irusappa*, 41 Mad 10, (107) 33 M L J 300 40 Ind Cas 664

88 Discharge —The test to be applied is whether it is the intention of the parties that each of the person in whose favour the obligation is created is a creditor for the whole if so a payment to one liberates the debtor against all the creditors if not each is a creditor for his own share and cannot give a discharge for the whole obligation—*Harishar v Bholi* 6 C 1 J 383

89 Who can give discharge —In a Muhammadan family, the heirs are entitled to definite shares as tenants in common and the cause of action of such heirs cannot be said to be a joint one for the purpose of limitation—*Alla Pichai v Pappathammal* 36 M L J 184, 51 Ind Cas 748

Co partners —The two illustrations show that one of several co partners can give a valid discharge without the concurrence of others

90 Co-obligees —In the case of co obligees of a money bond, in the absence of anything to the contrary the presumption of law is that they are entitled to the debt in equal shares as tenants in common Hence, where one of two co-obligees is a minor, limitation will run against the other co obligee who is not a minor in respect of that portion of the debt to which he is entitled and this section will not apply—*Manzur v Mahmudunnissa* 25 All 155 following *Steds v Steds* (1889) 22 Q B D 537

91 Co-trustees —One of several co trustees can give a valid discharge without the concurrence of others Therefore where an adult joint trustee takes no steps to protect the trust and his right to take steps becomes barred, the rights of the other joint trustees even though minors, become time barred—*Thyagaraja v Ratnasabhapathi*, 34 Mad 284, 20 M L J 421, 6 Ind Cas 992

92 Co-mortgagors —The right to redeem is an indivisible right, and one mortgagor cannot give a valid discharge without the concurrence of the other co mortgagors In 1895, the plaintiff's father (a Mahomedan) mortgaged his property to the defendants After the death of the mortgagor, his widow sold the equity of redemption to the mortgagee in 1901 and placed him in possession of the property although she was entitled to only an eighth share in it At that time one of the mortgagor's daughters (plaintiff no 3) had attained majority and his son (plaintiff no 1) did so in 1908 The youngest daughter (plaintiff no 2) attained majority in 1912 These three plaintiffs who owned the remaining seven shares sued in 1914 to redeem the mortgage, the lower Court held that the suit barred as regards plaintiffs 1 and 3 under Art 144 read with sec 6 High Court held that the right to redeem was an indivisible right,



neither of the plaintiffs who attained majority more than three years before the date of the suit was qualified to discharge or redeem the mortgage and the suit having been brought within three years from the date when the youngest plaintiff attained majority was within time under section 7 of the Limitation Act—*Gulam Goss v Shrivam Pandurang*, 43 Bom 487, 21 Bom L R 353 51 Ind Cas 79, *Bai Keval v Modhu Kola*, 46 Bom 535, 23 Bom L R 1191 64 Ind Cas 972 A I R 1922 Bom 319

93 Managing member of joint family —The managing member of a joint Hindu Mitakshara family has an implied authority to bind all the members by a discharge given by him without their concurrence, even though they be minors, and therefore time will run against them all —*Naurang v Sheoraja* 30 Ind Cas 75 *Harikar v Bholi* 6 C L J 383 *Huchrao v Bhimrao*, 42 Bom 277, 20 Bom L R 161, 44 Ind Cas 851 *Mahableshwar v Rama Chandra* 38 Bom 94, *Duraisami v Venkatrama* 21 M L J 1088, 12 Ind Cas 503 *Venkalasubbia v Vekateswarulu* 1917 M W N 816, 44 Ind Cas 566, *Surju Prasad v Khawahish* 4 All 512 *Doraisami v Nondisami* 38 Mad 118 (F B), *Kuppuswami v Kamalammal* 43 Mad 842 39 M L J 375 59 Ind Cas 662, *Narasimha v Krishnachandra* 37 M L J 256 52 Ind Cas 725 In an Allahabad case it has been held that if a joint Hindu Mitakshara family consists of brothers alone the elder brother cannot give a valid discharge without the concurrence of the others unless he acts as the manager, i.e. unless he takes active steps in the management of the affairs of the family—*Ganga Dayal v Mani Ram* 31 All 156, see also *Shampur v Ramchandra*, A I R 1925 Nag 385 88 Ind Cas 268 But the other High Courts are of opinion that in a Hindu family consisting of brothers the elder brother must be deemed to be the managing member of the family, and can give a discharge on behalf of the minor brothers—*Doraisami v Nondisami*, 38 Mad 118 (F B) 25 M L J 405, 21 Ind Cas 410 *Mahabeshwar v Ramchandra*, 38 Bom 94 15 Bom L R 882, 21 Ind Cas 350, *Bapu Talya v Bala Ravji*, 22 Bom L R 1383 45 Bom 446 (dissenting from 31 All 156) *Kuppusami v Kamalammal* 43 Mad 842, and this view has now been adopted by the Allahabad High Court also in the cases of *Rati Ram v Niadar*, 41 All 435 and *Shiamlal v Moolchand*, 87 Ind Cas 177 A I R 1925 All 672

In a joint Dayabhaga Hindu family of brothers the eldest brother cannot give a valid discharge to bind his minor younger brothers—*Nabin Chandra v Chandra Madhab* 44 Cal 1 at p 9 (P C)

94 Guardian —The natural or lawful guardian can give a valid discharge on behalf of his ward Thus, where a rent decree was obtained by an adult plaintiff and three minors who were described in the plaint as suing through the adult plaintiff as their guardian, it was held that the adult plaintiff being entitled to obtain the decretal amount and give a valid discharge, the matter came directly under this section, and the

minor plaintiffs are not protected by the provisions of section 6 and cannot wait till majority—*Bholanath v. Padmanath* 6 C W N 348

But a *de facto* guardian (e.g. a mother according to the Mahomedan law) is not the lawful guardian of the property of the minor and cannot therefore give a valid discharge—*Amina Bibi v. Rana Shankar* 41 All 473

95 Decree holders.—Section 8 of the Act of 1877 (corresponding to the present section) spoke only of joint creditors and claimants and did not apply at all to joint *decree holders*. The reason is that this section was held to be applicable only to those cases where the act of the joint owner was *per se* a valid discharge and since the discharge of a judgment-debtor's liability was always given by the order of the Court and never by the mere act of the decree holder this section was not applicable to decree-holders. See *Sesha v. Pajagopala* 13 Mad 236 *Narayanan v. Dimodram* 17 Mad 189 *Govindram v. Tahia* 20 Bom 383 *Zanir Hasan v. Sundar* 22 All 199 (F B) *Surya Kumar v. Arun Chunder* 28 Cal 465 *Periasami v. Krishna* 25 Mad 431

Now by reason of the express words 'application for the execution of a decree' the provisions of the present section apply to joint decree holders wherever one of them can act in the matter on his own authority without the concurrence of the others. Such a case arises for instance where the joint decree holders are brothers in a joint Hindu family some of whom are minors in such a case the adult brother representing the entire family can execute the decree on behalf of himself and the minor brothers and can give a valid discharge on behalf of all the minor brothers—*Rati Ram v. Nisadar* 41 All 435 17 A L J 649 49 Ind Cas 990 *Shyam Lal v. Mool Chand* A I R 1925 All 672 87 Ind Cas 177

* It is no doubt true that when the matter is in the execution Court it is literally true speaking of it as a matter of procedure to say that a discharge cannot be given because payment has to be made in and through the Court or certified by the Court so that the discharge becomes an order of the Court itself. But I take it the very clear view and I think it removes all difficulties in this case that sections 6 and 7 are dealing not with procedure but with the legal status of individuals and the expression 'where a discharge can be given' is merely intended in section 7 to be a definition of a person who in the ordinary legal language is described as being 'able to give a discharge'. That is a definition of his legal capacity in relation to the other persons jointly interested and not a description of his physical powers under the procedure of the execution Court—*per Walsh J in Rati Ram v. Nisadar* 41 All 435 (442-443). A decree was obtained in 1913 in a suit in which the plaintiffs were a father and his three sons and the three sons were described on the face of the proceedings as suing through their next friend and guardian viz the first plaintiff (father). The father died before execution the eldest of the three son

years from the date of A's death within which to bring a suit. Section 6 read with this section does not extend that time, except where the representative is himself under disability when the representation devolves upon him

Scope of Section—This section is ancillary to and restrictive of the concession granted in secs 6 and 7, and does not confer any substantial privilege—*Rangaswami v Thangavelu*, 42 Mad 637 (640)

Before the Act of 1877 was passed, section 7 applied to suits for pre-emption. See *Raja Ram v Bansu*, 1 All 207. This is no longer the law

99 Extension—This section must be read together with each article in Schedule I and when the period prescribed by the latter extends to three years or more, and expires within three years from the date of attainment of majority the intention is that the late minor should have the full term of three years but when the prescribed period is less than three years and the minor gets that period (according to Sec 6) from the date of the majority the prescribed period is not to be enlarged to three years—*Subramanya v Siva Subramanya* 17 Mad 316 (323)

The effect of section 6 is that a person under disability may sue after the cessation of the disability within the same period as he would otherwise have been allowed under the Schedule, and the present section adds a proviso that in no case can the period be extended to anything beyond three years from the cessation of the disability—*Vasudra v Maguni*, 24 Mad 387 (P C) at p 395

The extended period of three years after attaining majority can only be claimed by a person entitled to institute the suit at the time from which the period of limitation is to be reckoned. A person who was not in existence at that time does not come within this description and therefore is not entitled to the three years' extension. Thus, if a suit is brought to contest an alienation of joint family property it is from the date of alienation that the period of limitation is to be reckoned, and a coparcener born after the date of alienation cannot claim to bring a suit within three years after majority, as he was not in existence at the date of alienation, he cannot claim the benefit of this section—*Raoodip v Parameshwar* 47 All 165 (P C), 29 C W N A I R 1925 P C 33 86 Ind Cas 249

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attained majority in 1914 and applied for execution of the decree in 1917 (within three years of his attaining majority) It was contended that the application for execution was time barred in as much as the father became entitled to give a good discharge on behalf of his minor sons as soon as the decree was passed in 1913 and time ran from that date *Held* that as the father was acting not merely as the manager of the family but also as the *next friend or guardian* of the minor sons his powers were controlled by the provisions of O 32 r 6 of the C P Code and he could not do any act in his capacity as father or managing member which he was debarred from doing as a next friend or guardian without leave of the Court That is the father could not give a good discharge without the consent of the Court where the decree had been obtained And as the father died before applying for execution he had never been in a position to give a good and legal discharge Time would begin to run from the date when the respective disabilities of the minors would cease—*Lakshmanan v Sibiiah* 47 Mad 920 47 M L J 389 A I R 1925 Mad 78 (following *Ganesha Row v Tulja Ram Row* 36 Mad 295 P C) During the pendency of a suit the plaintiff (a Mahomedan) died Succession certificate was applied for and was granted to five persons viz the widow and four sons of the original plaintiff of these sons one H was a major and the other three were described as minors represented by their adult brother H as guardian A bond was taken from H to secure the interests of the minors These five persons were brought on the record and a decree was passed in 1913 in their names *Held* that the adult decree holder H was competent by reason of this certificate to give a valid discharge to the judgment debtors An application for execution made in 1920 was therefore barred and limitation was not saved by the fact that some of the decree holders were still minors—*Bilwar Bibi v Habibar* 51 Cal 566 A I R 1924 Cal 710 84 Ind Cas 704

Under the Mahomedan law the uncle is not the legal or natural guardian of the property of a minor and so if a joint decree is passed in favour of an adult uncle and his two minor nephew the adult decree holder is not competent to give a valid discharge so as to bind the interests of the minor decree holders—*Court of Wards v Abro Ali* 78 Ind Cas 285 A I R 1914 Lah 651

96 Receiver—A receiver was appointed to collect the debts due to a firm in which some of the partners were minors One of the assets of the firm was a decree An application for execution of the decree made more than three years after the appointment of the receiver was held as barred in as much as the receiver was competent to give a valid discharge When the debts had vested in the receiver the minority of any of the members would cease to have any importance for the rights of the minors and the rights of the majors were all absorbed by the receiver—*Giriya v Kanhiya* 18 C W N 138 20 Ind Cas 701

97 Tort — As a general rule where a joint right to sue arises out of a tort one or some of the holders of such right cannot give a discharge without the concurrence of the others unless they are all partners or executors or members of a joint Hindu family the manager of which has implied authority to bind all the members by his discharge—*Harthar v. Bhandari* (C L J 183). But this rule is not an inflexible one and where two persons have been jointly and severally injured by the same tortious act one is entitled to enforce his claim for damages so far as he has been injuriously affected by the tort although the claim of the other is barred by limitation—*Ibid*.

98 Pleading — If one of several plaintiffs is a minor and if the provisions of this section apply it would not be necessary in the plaint to expressly claim exemption from the law of limitation. The fact is patent on the record—*Gangathar v. Ahaja Abdul* (C L J 34).

8 Nothing in section 6 or in section 7 applies to suits to enforce rights of pre-emption, or shall be deemed to extend, for more than three years from the cessation of the disability or the death of the person affected thereby the period within which any suit must be instituted or application made

Illustrations

(a) A, to whom a right to sue for a legacy has accrued during his minority, attains majority eleven years after such accrual. A has under the ordinary law, only one year remaining within which to sue. But under section 6 and this section an extension of two years will be allowed him, making in all a period of three years from the date of his attaining majority, within which he may bring his suit.

(b) A right to sue for an hereditary office accrues to A who at the time is insane. Six years after the accrual A recovers his reason. A has six years under the ordinary law, from the date when his insanity ceased within which to institute a suit. No extension of time will be given him under section 6 read with this section.

(c) A right to sue as landlord to recover possession from a tenant accrues to A, who is an idiot. A dies three years after the accrual, his idiocy continuing up to the date of his death. A's representative in interest has, under the ordinary law,

years from the date of A's death within which to bring a suit. Section 6 read with this section does not extend that time, except where the representative is himself under disability when the representation devolves upon him.

Scope of Section—This section is ancillary to and restrictive of the concession granted in secs 6 and 7, and does not confer any substantial privilege—*Rangaswami v Thangavelu*, 42 Mad 637 (640)

Before the Act of 1877 was passed, section 7 applied to suits for pre-emption See *Raja Ram v Bansi*, 1 All 207 This is no longer the law

99 Extension—This section must be read together with each article in Schedule I, and when the period prescribed by the latter extends to three years or more, and expires within three years from the date of attainment of majority, the intention is that the late minor should have the full term of three years but when the prescribed period is less than three years and the minor gets that period (according to Sec 6) from the date of the majority, the prescribed period is not to be enlarged to three years—*Subramanya v Siva Subramanya*, 17 Mad 316 (323)

The effect of section 6 is that a person under disability may sue after the cessation of the disability within the same period as he would otherwise have been allowed under the Schedule, and the present section adds a proviso that in no case can the period be *extended* to anything beyond three years from the cessation of the disability—*Vasudeva v Maguni*, 24 Mad 387 (P C) at p 395

The extended period of three years after attaining majority can only be claimed by a person entitled to institute the suit at the time from which the period of limitation is to be reckoned A person who was not in existence at that time does not come within this description and therefore is not entitled to the three years' extension Thus, if a suit is brought to contest an alienation of joint family property, it is from the date of alienation that the period of limitation is to be reckoned, and a coparcener born after the date of alienation cannot claim to bring a suit within three years after majority, as he was not in existence at the date of alienation he cannot claim the benefit of this section—*Ranodip v Parameshwar*, 47 All 165 (P C), 29 C W N 666, A I R. 1925 P C 33, 86 Ind Cas 249

If a minor acquired a cause of action to sue for possession of property, and after attaining majority died within the three years allowed by this section, his legal representative can institute a suit at any time within the three years' period which had already commenced within the lifetime of the deceased, although more than twelve years have elapsed from the accrual of the cause of action—*Arjun v Ramabai*, 40 Bom 564, 18 Bom L. R. 579, 37 Ind Cas 221.

9 Where once time has begun to

Continuous running run no subsequent disability or inability
of time to sue stops it

Provided that where letters of administration to the estate of a creditor have been granted to his debtor the running of the time prescribed for a suit to recover the debt shall be suspended while the administration continues

100 Principle —The rule of this section has been taken from the English Law Time when once it has commenced to run in any case will not cease to do so by reason of any subsequent event Generally when any of the statutes of limitation have begun to run no subsequent disability will stop this running —Banning on Limitation (3rd Edn) pp 7 8 When the time has once begun to run it will continue to do so even should subsequent events occur which render it an impossibility that an action should be brought —Darby and Bosanquet on Limitation (2nd Edn) page 25

Parties to a contract may agree to postpone the accrual of any right under it but they cannot postpone the period of limitation in case a suit should have to be filed for its breach since under section 9 it is clear that when once limitation begins to run it cannot be stopped by a subsequent event Therefore where the period has commenced to run a reference to arbitration would not prevent the operation of the law of limitation and the period between the date of agreement to refer to arbitration and the date when the arbitration proceeding terminated should not be excluded from computation—*Ramamurthi v Gopayya* 40 Mad 701 31 M L J 231 35 Ind Cas 575 *Sheikh Abdul Rahim v Barira* 2 P L T 556 61 Ind Cas 807 6 P L J 273 (283) But see 39 C L J 40 and 43 Mad 845 cited below in Note 102 On the principle of this section it has been held that limitation having once commenced to run in the lifetime of a full owner cannot be taken to be suspended if he dies and is succeeded by a limited owner—*Bafsa Kuer v Raja Ram* 5 Pat 441 7 P L T 393 A I R 1926 Pat 192 When the time has once commenced to run against the absolute owner no subsequent alteration in the title will postpone the bar—*Lalabati v Bishun* 6 C L J 621

Scope of section —The section applies not only to suits but to applications as well The words to sue should be taken as including within it to apply in execution —*Muthu Korakkur v Madar Ammal* 43 Mad 185 (207) 38 M L J 1 (F B)

100A When times runs —Time runs when the cause of action accrues and the cause of action accrues when there is in existence a person who can sue and another who can be sued and when all the facts have happened which are material to be proved to entitle the plaintiff to sue

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ceed—*Coburn v Colledge* [1897] 1 Q B 102 *Gelman v Morriggia* [1913] 2 K B 549 The cause of action arises when and only when the aggrieved party has the right to apply to the proper tribunals for relief—*Whalley v Whalley* (1816) 1 M & R 436 It is only when the cause of action is complete that the bar of time begins to run for example if a previous demand is required before the complete right to sue arises the time will only run as from the date of demand—*Tidd v Overell* [1893] 3 Ch 184 (Compare Arts 60 88 89) Therefore if the plaintiff commences his action before his right of action is complete he must inevitably fail in the action even though he should be able to acquire and actually acquire the outstanding right during the currency of the action—*Godfrey v Tucker* (1863) 33 Beav 280 For example a remainder man unless he first gets in the prior subsisting life estate will lose his action for a partition although he should have got in the life estate during the currency of the action—*Evans v Bagshaw* (1870) L R 8 Eq 469 L R 5 Ch App 340 The Statute of limitation does not attach to a claim for which there is as yet no right of action and does not run against a right for which there is no corresponding remedy or for which judgment cannot be obtained Consequently the true test to determine when a cause of action has accrued is to ascertain the time when the plaintiff could have first maintained his action to a successful result—*Angell on Limitations* sec 42 *Story's Equity Jurisprudence* sec 1521 a Whenever proceedings are being conducted between the parties *bona fide* in order to have their mutual rights and obligations in respect of a matter finally settled the cause of action for an application or for a suit the relief claimable wherein follows naturally on the result of such proceedings should be held to arise only on the date when those proceedings finally settle such rights and liabilities—per Sadasiva Ayyar J in *Muthu Korakkai v Madar Ammal* 43 Mad 185 (F B) An useful analogy is furnished by cases where it has been ruled that time cannot be held to run against a person who is not in a position to sue for such a person has no enforceable cause of action which is extinguished by lapse of time thus adverse possession against a tenant does not operate against the landlord during the continuance of the tenancy—*Woomesh v Raj Narain* 10 W R 15 so also adverse possession against a mortgagor does not operate against a simple mortgagee who is not entitled to immediate possession—*Priya Sakhi v Manbodh* 44 Cal 425

In a recent case of the Calcutta High Court M N Mukherji J has remarked that the statement that the cause of action accrues only when the plaintiff could have maintained his action to a successful result should be accepted with caution His Lordship observes A careful study of the third column of the schedule reveals an outstanding fact which cannot be ignored namely that the starting point of limitation does not always synchronise with the cause of action in many cases it does but in others

it dates from some specified events which are either anterior or posterior to the accrual of the cause of action

In the case of such of the articles of the Limitation Act in which the starting point of time synchronises with the cause of action, I am prepared to hold that the test is to ascertain the time when the plaintiff could have maintained his action to a successful issue. If, in such a case, at the time when the cause of action arises, there is no person capable of suing upon it, the statute does not run. Similarly, it is necessary that there shall be a person to be sued, and it is also necessary that the cause of action should be completed that is, all the facts must have happened which are material to be proved in order to entitle the plaintiff to succeed.—*Sarat Kamini v Nagendra*, 29 C W N 973, 43 C L J 155, 89 Ind Cas 1000, A I R 1926 Cal 65

101 Disability, Inability—Disability is want of legal qualification to act inability is want of physical power to act—*Purno v Sassoon*, 25 Cal 496 (F B) at p 504 For the purpose of limitation, a disability is the state of being a minor, insane or an idiot, whereas illness, poverty etc are instances of inability

The disability or inability contemplated by sec 9 is confined to such cases as are mentioned in the Act itself, and new exemptions cannot be recognised—*Sarat Kamini v Nagendra*, 29 C W N 973 A I R 1926 Cal 65 (67)

The Legislature has caused some confusion in introducing the word 'inability' into this section, there being no 'inability' mentioned in any portion of the Act. Consequently the inability referred to here must be held to be a personal inability affecting the plaintiff himself and having reference to his condition, state or position, and not to the circumstances of the person against whom he is suing. The fact that the plaintiff was unable to sue the defendant owing to the latter's absence from British India would not constitute an inability under this section so as to make the period of limitation run continuously. In such a case the rule of section 13 will apply and the period of defendant's absence from British India will be excluded from computation. This section does not in any way qualify section 13—*Hanmantram v Bowles*, 8 Bom 561 (dissenting from 6 Bom 103) *Beake v Davis*, 4 All 530. The defendant's absence from British India does not amount to inability to sue—*Jitraj v Dabaji*, 29 Bom 68 (70)

In cases where the plaintiff is unable to sue because of the non appointment of a personal representative to a deceased debtor in whose life time the period has commenced to run, but who has died subsequently, the statute will continue to run—*Rhodes v Smethurst* 4 M & W 42 *Boatwright v Boatwright*, L R 17 Eq 71

This section contemplates a case of *subsequent* and not of *initial* disability, that is, it contemplates those cases where the disability has occurred after the accrual of the cause of action, whereas cases of initial

disabilities have been provided for by section 6. Thus a decree holder after making various applications for execution of a decree each of which was within time died. His son a minor made an application for execution of the decree within three years after his father's death but more than three years after the date of the deceased father's last application. It was held that this section applied and not section 6 and the minor's application for execution was time barred it being a case not of initial but of subsequent disability—*Jivraj v Babaji* 29 Bom 68 *Kalka Bahadur v Ram Charan* 40 All 630 (F B) 16 A L J 633 46 Ind Cas 584. Where a decree holder died leaving a minor son who on attaining his majority nine years after the date of the decree applied for execution it was held that the application was barred as time had begun to run in the original decreeholder's lifetime—*Bhagat v Ramnath* 27 All 704 *Bhagwant Ramchandra v Kaji Mahamad* 36 Bom 498 *Nusheeram v Shushee* 5 W R 169 *Vira v Muruga* 2 M H C R 340. But where the original decreeholder who obtained a decree in May 1886 died in June 1888 leaving three minor sons and on 30th April 1889 the sons still minors made an application for execution but no further proceedings were taken till 1st October 1904 when another application was made held that the present application was within time on the ground that although limitation had commenced to run against the father from May 1886 the application made by the minors on the 30th of April 1889 was a step in aid of execution and time began to run anew from that date and then minority suspended it—*Sri Ram v Het Ram* 29 All 279.

The insanity of the decreeholder which began after the passing of the decree did not save limitation which had already commenced to run from the date of the decree—*Aya Singh v Gurdial* 1906 P W R 72.

An unregistered instalment bond was executed in favour of a Hindu widow. It contained a stipulation that the whole amount would be recoverable in default of payment of two consecutive instalments. Default was made in payment of two instalments in 1899. Shortly after the default the widow adopted the plaintiff who was then a minor. In 1908 within three years of attaining majority but nine years after default he sued on the bond but expressly relinquished the amount due in respect of the first two instalments which had fallen due prior to his adoption on the ground that he had waived payment of the same. On this footing he alleged that the cause of action had arisen during his minority and that therefore the claim for the remaining instalments was not barred. It was held that mere abstinence from suing did not amount to waiver that limitation had begun to run from the default in 1899 and no subsequent disability viz the minority of the plaintiff could prevent it from running the suit was barred by the three years rule under Article 75—*Girindra Mohan v Alir Narayan* 36 Cal 394. A suit by a shebait in 1913 to recover possession of a debutter property held by the defendant under a

mokarari lease granted by a previous shebait in 1876 is barred by Article 134 as brought more than 12 years after the date of the lease. The representation of an idol by shebait is a continuing representation and limitation runs against the idol continuously and not against each shebait individually if and when he succeeds to the shebaitship. Consequently the fact that the succeeding shebait was a minor would not stop the running of time by virtue of the provisions of this section—*Maur all v Annada* 77 C L J 201

The plaintiffs a German Bank were the endorsees of certain promissory notes drawn by the defendants dated June 1914. On the 4th August 1914 war was declared with Germany and the plaintiffs were debarred from bringing any action to enforce their claim. On 1st November 1915 the plaintiffs obtained license from Government to bring an action and on 9th May 1918 the present suit was filed. The plaintiffs claimed that the period between the 4th August 1914 and 1st November 1915 should be deducted from computation and they urged that their suit was within time. It was held that the suit was barred. Under this section once time has begun to run no subsequent disability or inability in the shape of suspension of right to sue stops it and the plaintiffs are not entitled to exclude the period of such suspension—*Deutsche Asiatische Bank v Hira Lal* 46 Cal 526 23 C W N 157 47 Ind Cas 392. And so in a case that occurred during the time of the English Civil Wars the plaintiff in answer to a plea of limitation replied that a Civil War had broken out and the Government was usurped by certain traitors and rebels which hindered the course of justice and by which the Courts were shut up and that within six years after the war ended he commenced his action and yet his replication was held to be ill—*Prideaux v Hebbert*, 1 Lev 31.

Voluntary and involuntary disabilities—There is no distinction between voluntary and involuntary (e.g. caused by minority) disabilities—*Khanjan v Bhikan* 18 Ind Cas 306 (Oudh). As the rule stands it appears to apply strictly to every case of subsequent disability or inability excepting those cases that may be specifically exempted from the operation of this rule. Even circumstances beyond the control of the plaintiff have been held not to relax the rigour of the rule in favour of the plaintiff—*Ibid*. In *Doe d Duroure v Jones* (1791) 4 T R 300 2 R R 390 Lord Kenyon observed that it was mischievous to make any refined distinctions between voluntary and involuntary disabilities.

102 **Suspension of cause of action**—Ordinarily time begins to run from the earliest time at which an action can be brought and after time has commenced to run there may be a revival of the right to sue when a previous satisfaction of the claim is nullified with the result that the right to sue which had been suspended is re-animated—*Dwijendra v Jogesh Chandra* 39 C L J 40 79 Ind Cas 50 A I R 1924 Cal 600. Thus

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Voluntary and involuntary disabilities—There is no distinction between voluntary and involuntary (e.g. caused by minority) disabilities—*Khanjan v Bhikan* 18 Ind Cas 306 (Oudh). As the rule stands it appears to apply strictly to every case of subsequent disability or inability excepting those cases that may be specifically exempted from the operation of this rule. Even circumstances beyond the control of the plaintiff have been held not to relax the rigour of the rule in favour of the plaintiff—*Ibid*. In *Doe d Durore v Jones* (1791) 4 T R 300 2 R R 390, Lord Kenyon observed that it was mischievous to make any refined distinctions between voluntary and involuntary disabilities.

102 **Suspension of cause of action**—Ordinarily time begins to run from the earliest time at which an action can be brought and after time has commenced to run there may be a revival of the right to sue when a previous satisfaction of the claim is nullified with the result that the right to sue which had been suspended is re animated—*Dwijendra v Jogesh Chandra* 39 C L J 40 79 Ind Cas 520 A I R 1924 Cal 600. Thus,

certain disputes between a principal and an agent were referred to arbitration and under the award thereon certain moneys were paid by the agent in satisfaction of the claim. The agent afterwards sued to set aside the proceedings on the ground that they were brought about by coercion and succeeded in getting back the amount paid. The principal subsequently sued the agent to enforce the original liability to account. The defendant pleaded *inter alia* that the suit was barred. Held that the setting aside of the satisfaction in the former proceedings gave rise to a fresh cause of action and that the suit was therefore in time—*Muthucierappa v Adaiheppa* 43 Mad 845 39 M L J 312. Plaintiff realised the money due to him from the defendant on an award which had merged in a decree of Court. Subsequently the award was set aside and the plaintiff directed to refund the money realised by him. In a suit by the plaintiff for recovery of the amount it was held that when the plaintiff's original claim was satisfied in execution limitation ceased running against him. On the annulment of that satisfaction a fresh cause of action arose and the suit was within time—*Kartar Singh v Bhagat Singh* 320 64 Ind Cas 454. A sale under the Patni Regulation having been set aside and the patnidars restored to possession the Zemindar sued them to recover the arrears of rent which had accrued before and during the time they were out of possession. The tenants contended that the claim was barred because the suit had not been brought within three years from the date when each instalment of rent fell due but the Judicial Committee overruled the contention and held that the cause of action accrued upon the reversal of the auction sale and the consequent revival of the obligation to pay the rent—*Surnomoyee v Shooshee Mookhee* (1868) 12 M I A 244 (P C). A debtor agreed to convey certain property to his creditor and to set off the debt against part of the consideration for the conveyance. A sale deed was executed but a dispute arose as to whether it had been executed in accordance with the contract. Litigation was commenced by the debtor to enforce the agreement but he was unsuccessful. The creditor then sued to recover the debt and was met with the plea of limitation. The Judicial Committee held that the time began to run only when the agreement became wholly ineffectual and that from that date a fresh obligation was imposed upon the debtor to pay his debt—*Bassu Koer v Dhum Singh* 11 All 47 (P C). See also *Nrityamani v Lakhan Chandra* 43 Cal 600 (P C) cited in Note 156 under sec 14 and *Prannath v Rookeu Begum* 7 M I A 323 (P C). *Hem Chandra v Kali Prasanna* 30 Cal 1033 (P C).

But in the following cases the Judicial Committee and the Indian High Courts have strictly applied the principle of sec 9 that when once time has begun to run no subsequent inability to sue stops it—*Huro Persad v Gopal Das* 9 Cal 255 (P C). *Lala Soni Ram v Hanhaiya Lal* 35 All 227 (P C). *Juscurn v Pirtha Chand* 46 Cal 670 (P C). *Hukun*

Chand v Shashab Din, 4 Lah 90 71 Ind Cas 495 Thus where a mortgagee is entitled to possession immediately, time begins to run from the date of the mortgage (Art 135) and the mere fact that the possession of the mortgaged property was subsequently taken by a prior mortgagee does not prevent limitation from running—*Hukam Chand v Shashab Din* (supra)

For a full discussion on this subject see the judgments of Sir Asutosh Mukherjee J in *Dwijendra Narain v Jogesh Chandra* (cited above) and of M N Mukerji J in *Sarat Kamini v Nagendra Nath* 29 C W N 973, 43 C L J 135 1 I R 1926 Cal 65

103 Proviso—The principle of the proviso is this ‘When after the Statute has commenced to run the right to sue and the right to be sued meet by act of law (and unite) in the same person the further running of the Statute will be suspended during the period of the union of the two rights—*Seagram v Knight* (1867) 36 L J Ch 918 *Burdick v Garrick*, (1871) L R 5 Ch App 233 Where the band to pay and receive is practically the same a constructive payment is presumed See *Topham v Booth*, 25 Ch D 607 *In re Dixon* 2 Ch 561 The general rule that when time has once begun to run nothing happening subsequently will prevent it from continuing to run is inapplicable where the debtor takes out administration to the creditor for in such a case there is a suspension of the remedy—*Seagram v Knight* (supra) Thus where a debtor was appointed one of several executors but he did not prove the will until his debt was barred by time and then he subsequently proved the will the debt was held to be thereby revived and the debtor executor was ordered to account for the debt with interest—*Ingle v Richards* (1860) 20 Beav 366

This proviso applies only to an administrator under the grant of letters, where he is a debtor of the deceased—*Damodar v Dayal* 11 Bom L R, 1187 It cannot be extended to a case where the rights of the mortgagor and the mortgagee vest in the same person In such a case, limitation would not be suspended Thus a usufructuary mortgage was executed in 1842 in favour of K The mortgagee died in 1898 but between 1883 and 1898 one M had by assignment acquired the rights of the mortgagee as also the mortgagee's rights and was in possession of the estate In 1904 the heirs of K sued for and obtained possession of the estate from M (treating him as a trespasser) and in 1907 M's son S sued to recover the property from the heirs of K Held that the suit was barred by Article 148 Limitation had commenced running against the mortgagor from 1842 and it was not suspended between 1883 and 1898 on account of the fusion of the mortgagor's and mortgagee's interests in M & his son that period The proviso to section 9 did not apply to the case *Lal's Son v Ram v Kanhaiya Lal* 35 All 227 (P C) 19 Ind Cas 251 17 C W N 605

10 Notwithstanding anything hereinbefore contained, no

Suits against express trustees and their representatives
 suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration), for the purpose of following in his or their hands such property, or the proceeds thereof, or for an account of such property or proceeds, shall be barred by any length of time

103A. The rule of this section follows the English law. Section 25 (2) of the English Judicature Act 1873 (36 and 37 Vict. C. 66) lays down — "No claim of a cestui que trust against his trustee for any property held on an express trust or in respect of any breach of such trust, shall be held to be barred by any Statute of Limitation." It is well settled both as regards real estate and personal estate that time does not in equity bar the remedy of the beneficiary against the trustee—*Wederburn v. Wederburn*, (1838) 4 My. & Cr. 41. *Bridgman v. Gill*, (1857) 24 Beav. 302. If there is created in express terms whether written or verbal a trust and a person is in terms nominated to be the trustee of that trust, a Court of equity, upon proof of such facts will not allow him to vouch a Statute of Limitation against a breach of that trust—*Soar v. Ashuell*, [1893] 2 Q. B. 390.

The words of this section mean that when a trust has been created expressly for some specific purpose or object and property has become vested in a trustee upon such trust, the person who is beneficially interested in that trust may bring a suit against such trustee to enforce that trust at any distance of time—*Kherodmoney v. Doorgamoney*, 4 Cal. 455.

104 Who is not a trustee.—All persons holding a fiduciary relation are not necessarily trustees within the meaning of this section. Thus, the position of agents, managers, factors and benamidars may be and generally is a fiduciary one, but none of them are necessarily trustees—*Kherodmoney v. Doorgamoney*, 4 Cal. 455. *Aishen D. v. Ram Chand*, 26 P. L. R. 288.

A mortgagee in possession after the mortgage has been satisfied is not a trustee for the mortgagor—*Babu Lal Dass v. Jamal*, 9 W. R. 157. See also sec. 2 (11). A suit against such mortgagee is governed by Art. 103.

The position of the sons who manage the estate of a deceased Mahomedan is not, by reason of such management, that of trustees as regards the daughters—*Mahomed Abdul v. Aimal Karim*, 16 Cal. 161 (P. C.).

A Muhammadan husband is not a trustee for his wife in respect of her dower—*Mir Mohar v. Anam*, 2 B. L. R., A. C., 306.

A person with whom money is kept in deposit is not a trustee—*Mukhta v Gayraj* 1 A L J 422 *Dahja v Labhu* 1919 P R 4 *Kalyan Mal v Aiskew Chaud.* 41 All 643 (645)

A banker and customer do not stand in the relation of trustee and cestui que trust but only of debtor and creditor or of borrower and lender—*Foley v Hill* 2 H L Cas 28 Article 60 now expressly provides for the case

A depositor or banker or agent or debtor to whom a loan is made and who promises to return the loan does not thereby become a trustee within the meaning of this section—*Rajammal v Lakshammal* 1914 M W 606 22 Ind Cas 930 An agent is not a trustee—*Bhargyalal v Beharilal*, A I R 1925 Nag 115

A *tenamidar* is not a trustee—*Booma v Dwarakanath* 11 W R 72, *Ariskra Patil v Lakshmi* 45 Mad 413 see sec 2 (11)

A surviving partner is not a trustee for the representative of the deceased partner—*Arora v Gye* L R 5 H L 636 (676)

Where a mortgagee in contravention of the terms of O 34 rule 14 of the C P Code has attached the mortgaged property and brought it up to sale and purchased it himself he does not become a trustee for the mortgagor in respect of the latter's equity of redemption so as to enable the latter to bring a suit for redemption at any length of time—*Uttam Chandra v Raj Krishna* 47 Cal 377 414 (F B) 24 C W N 229 31 C L J 98

Co-heirs—If one heir of a deceased person recovers the debt due to the deceased on behalf of all the other heirs he does not thereby become a trustee for the others. A suit brought against him by the other heirs for their share of money is governed by Art 6, and not by this section—*Amma v Najmunnissa* 37 All 233 (-40) 13 A L J 255 27 Ind Cas 712

115 Who is a trustee—The mohant of a *mutt* is a trustee of the *mutt* properties—*Devasikamani v Valliammal* 37 M L J 231 *Ram Perikash v Anand* 43 Cal 707 (P C) *Basudeo v Mohant Jugal Kishore*, 22 C W N 841 (P C) *Baluswami v Venkataswami* 40 Mad 745

A suit for the recovery of balance of money advanced by the plaintiff to the defendant who was his servant for the purpose of erecting buildings, the money having been entrusted to the defendant to be accounted for by him will not be barred by limitation for the matter was of the nature of a trust—*Narain Doss v Maharaja Mahatab Chunder* 10 W R 174 Where property is vested in a person partly for charitable purposes and partly for the benefit of others and he is bound to use it for such purposes and not for his own advantage he is a trustee—*Alleh v Nuseebun*, 21 W R 415 Where immovable property was given possession of to the defendant to sell the crops to pay the Government dues and to account for the profits to the plaintiff on his claiming them it was held that the

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103A The rule of this section follows the English law Section 25 (2) of the English Judicature Act 1873 (36 and 37 Vict C 66) lays down — 'No claim of a cestui que trust against his trustee for any property held on an express trust or in respect of any breach of such trust shall be held to be barred by any Statute of Limitation It is well settled both as regards real estate and personal estate that time does not in equity bar the remedy of the beneficiary against the trustee—*Wederburn v Wederburn* (1838) 4 My & Cr 41 *Bridgman v Gill* (1857) 24 Beav 307 If there is created in express terms whether written or verbal a trust and a person is in terms nominated to be the trustee of that trust a Court of equity upon proof of such facts will not allow him to vouch a Statute of Limitation against a breach of that trust—*Soar v Ashwell* [1893] 2 O B 390

The words of this section mean that when a trust has been created expressly for some specific purpose or object and property has become vested in a trustee upon such trust the person who is beneficially interested in that trust may bring a suit against such trustee to enforce that trust at any distance of time—*Kherodmoney v Doorgamoney* 4 Cal 455

104 Who is not a trustee —All persons holding a fiduciary relation are not necessarily trustees within the meaning of this section Thus, the position of agents managers factors and benamidars may be and generally is a fiduciary one but none of them are necessarily trustees—*Kherodmoney v Doorgamoney* 4 Cal 455 *Kishen Das v Ram Chand*, 26 P L R 288

A mortgagee in possession after the mortgage has been satisfied is not a trustee for the mortgagor—*Babu Lal Dass v Jamal* 9 W R 187 See also sec 2 (11) A suit against such mortgagee is governed by Art 105

The position of the sons who manage the estate of a deceased Mahomedan is not, by reason of such management that of trustees as regards the daughters—*Mahomed Abdul v Amtal Karim* 16 Cal 161 (P C)

A Muhammadan husband is not a trustee for his wife in respect of her dower—*Mir Mohar v Anani*, 2 B L R A C 306

A person with whom money is kept in deposit is not a trustee—*Mukhta v Gajraj*, 1 A L J 422 *Dihpa v Labhu* 1919 P R 4 *Kalyan Mal v Kishen Chand* 41 All 143 (645)

A banker and customer do not stand in the relation of trustee and *cestui que trust* but only of debtor and creditor or of borrower and lender—*Foley v Hill* 2 H L Cas 28 Article 60 now expressly provides for the case

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A *benamidar* is not a trustee—*Hooma v Dwarkanath* 11 W R 72, *Krishna Pattar v Lakshmi* 45 Mad 415 see sec 2 (11)

A surviving partner is not a trustee for the representative of the deceased partner—*Anox v Gye* L R 5 H L 656 (676)

Where a mortgagee in contravention of the terms of O 34 rule 14 of the C P Code has attached the mortgaged property and brought it up to sale and purchased it himself he does not become a trustee for the mortgagor in respect of the latter's equity of redemption so as to enable the latter to bring a suit for redemption at any length of time—*Uttam Chandra v Raj Krishna* 47 Cal 377 414 (F B) 24 C W N 229 31 C L J 98

Co heirs—If one heir of a deceased person recovers the debt due to the deceased on behalf of all the other heirs he does not thereby become a trustee for the others A suit brought against him by the other heirs for their share of money is governed by Art 62 and not by this section—*Amina v Najmunnissa* 37 All 233 (240) 13 A L J 255 27 Ind Cas 712

105 Who is a trustee—The mohant of a *mull* is a trustee of the *mull* properties—*Devasikamani v Valliammal* 37 M L J 31 *Ram Perakash v Anand* 43 Cal 707 (F C) *Basudeo v Mohant Jugal Kishore* 22 C W N 841 (F C) *Baluswami v Venkataswami* 40 Mad 745

A suit for the recovery of balance of money advanced by the plaintiff to the defendant who was his servant for the purpose of erecting buildings, the money having been entrusted to the defendant to be accounted for by him will not be barred by limitation for the matter was of the nature of a trust—*Narain Doss v Maharaja Mahatab Chunder* 10 W R 174 Where property is vested in a person partly for charitable purposes and partly for the benefit of others and he is bound to use it for such purposes and not for his own advantage he is a trustee—*Alleh v Nuseebun* 21 W R 415 Where immoveable property was given possession of to the defendant to sell the crops to pay the Government dues and to account for the profits to the plaintiff on his claiming them it was held that the

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defendant was not a depository but a trustee of the property—*Vital v Ram Chandra* 7 B H C R A C 149

Where A handed to the defendant the key of his place of business and asked him to take charge of his goods and outstandings to pay certain specified debts out of them and to apply the residue for the benefit of A's family a good trust was created within the meaning of this section—*Suddasook v Ram Chunder* 17 Cal 620

Where certain jewels were in the possession of the defendant and he agreed under a written instrument that the plaintiff should enjoy the jewels for her life and that after her death they should be divided among the defendant and the other parties to the instrument *Jeld* that the defendant was an express trustee of the jewels for the plaintiff and that a suit by her for the jewels or their value fell under this section—*Kislappa Chetty v Lakshmi Ammal* 44 M L J 431 72 Ind Cas 842 A I R 1923 Mad 578

A Receiver appointed under the order of the Court is a trustee—*Seagram v Tuck* 18 Ch D 296

Where a person sentenced to transportation for life makes over his properties to be managed by his brother or other near relatives and requests the Revenue authorities to have those properties transferred in the name of the latter such transfer is in the nature of a trust—*Hari Ram v Durga Prasad* 5 All 608

Under section 69 of the Transfer of Property Act the money received by a mortgagee arising from sale of the mortgaged property in pursuance of a power of sale should be deemed as held by him in trust to be applied in the manner directed in that section See also *Haji Abdul Rahman v Noor Mahomed* 16 Bom 141 In England also where the mortgagee has exercised the power of sale in good faith and without collusion he is only a trustee for the mortgagor in respect of the balance of the sale proceeds—*Varner v Jacob* 20 Ch D 70

A trustee *de son tort* is in the same position as an express trustee and a suit for accounts in respect of trust property in his hands comes under this section—*Dhanpal v Mohesh Nath* 24 C W N 752 But the Allahabad High Court is of opinion that section 10 does not apply to a suit for account against a trustee *de son tort* such a suit is governed by Article 120—*Behari Lal v Shiv Narain* 22 A L J 866 A I R 1924 All 884 (dissenting from 24 C W N 752)

A person who is once in possession in a fiduciary character does not cease to hold in that character merely because it becomes uncertain who is the actual person to whom he has to account—*Lyell v Kennedy* 14 A C 437

106 Government—The Government and the Secretary of State cannot be trustees—*Amloch v Secretary of State* L R 15 Ch D 1 at p 9 The fact that the Government took possession of a property (a

khote village) originally with the intention of keeping it only until the rival claimants to it established their claim in the Civil Court cannot imply that the Government agreed to hold the property in trust for an indefinite time on behalf of the rightful owner. This section cannot apply to the case and a suit brought to recover the property which was for fifty years in the possession of the Government was barred—*Secretary of State v. Sakharani* 24 Bom 23.

The Government by directing the Court of Wards to take charge of an estate during the minority of the next claimant does not constitute itself a trustee for the rightful owner—*Pilkonda Zemindar v. Secretary of State* 5 Mad 91 (1 B) affirmed on appeal in *Liziamarazu v. Secretary of State* 8 Mad 525 (P C).

This section will not apply to a suit against the Secretary of State to recover the surplus proceeds of a sale for arrears of revenue. The Government is not a trustee in respect of such money—*Secretary of State v. Faral Ali* 18 Cal 234. *Secretary of State v. Guru Proshad* 20 Cal 51 (1 B). See also *Chandra Kahi v. E. P. Chapman* 32 Cal 799 (at p 813) where it was held that the Government was not a trustee in respect of certain G. P. notes which were paid into Court under a consent decree and subsequently lost. The Judge remarked that the Comptroller General or any other officer charged with the payment of the obligations of the Government could not be regarded as a trustee; their duty was simply to pay the debts of the Government in a certain way. He further held that there had been no vesting in trust for any purpose in the Registrar of the Court and the G. P. Notes could not be regarded as trust property.

But under certain exceptional circumstances the Government can be a trustee within the meaning of this section. Thus it was held in *Secretary of State v. Bapuji Mohadev* 39 Bom 57 that under the special circumstances of the case money lying in deposit in the Govt. Treasury as surplus sale proceeds was money vested in Government in trust for a specific purpose and a suit to recover the money was not barred by any length of time. The facts of the case are that one Chunto Mahipat of Satara ancestor of the plaintiff owed money to one Sheik Syed Mufati of Aurangabad and in order to satisfy that debt Shrimant Partapsing Maharaj the then Raja of Satara caused Chunto Mahipat's unmoveable property to be sold in 1835 and out of the sale proceeds the debt was paid off and the balance of Rs. 1793 was credited in the Government treasury in the name of Chunto Mahipat. After many years the plaintiff who stood in the shoes of Chunto Mahipat sued for the money and it was held that the East India Company as well as the Government of India who succeeded it was a trustee (following *Walsh v. Secretary of State for India* (1863) 10 H. L. C. 367).

The same view has been expressed in a recent case by the Madras High Court. The facts of the case are peculiar and interesting. After the administration of the principality of Tanjore was taken over by the

East India Company, an agreement dated 11th February 1824 was entered into between the Company and the creditors of the deposed Raja for payment of debts due to them from the Raja. In accordance with this agreement bonds were issued to the creditors in 1845 including the suit-bond in favour of the plaintiff's ancestor. In 1853 and 1858 the East India Company and its successor the Government of India had published notices for payment of the bond debts on tender of the notes and declared that interest would henceforth cease. The plaintiff issued a notice of demand in 1916, and instituted the present suit in 1919 against the Secretary of State who pleaded the bar of limitation. *Held* that the East India Company and its successor the Government of India had become trustees for a specific purpose under the agreement of 1824 for the discharge of the bonds issued in pursuance thereof, and the suit viewed as one by the plaintiff against the defendant as trustee was not barred by limitation by reason of section 10 of the Limitation Act—*Secretary of State v Radhika Prasad Bapuli*, 46 Mad 259, 44 M L J 685, 74 Ind Cas 785 A I R 1923 Mad 667.

107. **Executor, Administrator**—This section will apply to an executor only if he is a trustee for a specific purpose, the mere appointment of a person as an executor does not make him a trustee—*Damodar v Dayal*, 11 Bom L R 1187. *Nagarathnammat v Namastaya*, 5 Ind Cas 832. *Baroda v Gajendra*, 13 C W N 557. Whether an executor is a trustee for a specific purpose depends upon the facts of each case—*Damodar v Dayal*, 11 Bom L R 1187. Where the executors in a will were expressly called trustees, and were entrusted with the testator's property for certain definite purpose, *held* that this section applied—*Dhunjishaw v Sorabji*, (1896) P J 572. Where certain property was by will vested in executors to pay legacies and the residue to the testator's widow who sued for administration of her share and for a declaration that certain lease granted by the executors to themselves was void against her, it was held that the suit was within this section as the property was vested in the executors in trust for a specific purpose, viz to pay legacies etc.—*Nislarani v Nundolal*, 30 Cal 369. Where a will gave no directions as to the disposition of the residue, the executors were not trustees of the residue for a specific purpose—*Nanlal v Harlochand*, 14 Bom 476.

In England also the executor is not an express trustee even for a legatee—*Evans v Moore*, [1891] 3 Ch 119. An executor is in general a constructive trustee only, although popularly described as a trustee, and while and so long as he is but a constructive trustee, the lapse of time will operate to bar the legacy—*Evans v Moore*, (supra); *In re Mackay*, [1906] 1 Ch 25. That is to say, only an *express* trust, and not a mere constructive trust, will suffice to prevent the bar of time running against a legacy. An executor is always a trustee, in a sense, for creditors and legatees because he holds the personal estate for their benefit and not for his own

benefit but such a trust is not an express trust and does not exclude the application of the bar of time—*Evans v Moore* (supra) The ordinary direction in a will to the executors (whether or not being also trustees of the will) to pay the debts and the legacies creates no trust for their payment and the mere use of the word trust in the bequest to the creditors (upon trust to pay the debts and the legacies) will not without more create a trust either for the creditors or for the legatees in either case the lapse of time will be a bar to the legacy—*Cadbury v Smith* (1869) L R 9 Eq 37 Neither an executor nor an administrator becomes an express trustee for a legatee merely because his duties as such are performed and he retains moneys on behalf of those claiming the estate He does not become a trustee by the performance of his duties *qua* executor In other words when the debts and funeral expenses are paid he does not become a trustee for the residue—*In re Mackay* (1906) 1 Ch 25

An administrator in whom no special trust is vested for a specific purpose is not a trustee—*Janardhan v Jankibai* 2 P L J 42 (649)

108 Vested.—Vesting implies that some one has an estate in the subject matter of the alleged trust not merely that he has power to charge it or direct how it should be disposed of—*Dickinson v Teasdale* 1 De G & S 57 *Cowdall v Charlton* 42 Q B D 120 Therefore the directors of a company are not trustees because they are not persons in whom the property of the company may be said to have been vested under this section—*Kathiawar Trading Co v Firchand* 18 Bom 119 *Daulat Ram v Bharat National Bank* 5 Lah 27 (31) *Bank of Multan Ltd v Hukam Chaud* 71 Ind Cas 899 A I R 1923 Lah 58 So also the liquidator of a company is not strictly speaking a trustee for the creditors but is merely an agent of the company—*Knowles v Scott* [1891] 1 Ch 717 The *karta* of a joint Hindu family is not a trustee because the property cannot be said to have vested in him—*Biswambhar v Giribala* 32 C L J 25 A minor girl inherited property from her maternal grandfather The father of the minor took charge of the property and managed it More than six years after attaining majority the daughter sued her father to recover moneys not accounted for and claimed that the suit was not barred as section 10 applied to the case Held that the father simply managed the property and there was in fact no trust in this case but by his acts he had only incurred obligations similar to those of a trustee The property did not vest in him as trustee the word vest implies that the property becomes in law the property of the trustee—*Ma Thein v U Po* 3 Rang 206 A I R 1925 Rang 289 86 Ind Cas 297 But the Madras High Court is of opinion that the word 'vesting' simply means properly having control of the property—*Kishappa v Lakshmi* 44 M L J 431 A I R 1923 Mad 578 *Pachayappa v Sivakar* 49 M L J 468 A I R 1926 Mad 109

In the case of a religious endowment in which there is a

East India Company, an agreement dated 11th February 1824 was entered into between the Company and the creditors of the deposed Raja for payment of debts due to them from the Raja. In accordance with this agreement bonds were issued to the creditors in 1845 including the suit-bond in favour of the plaintiff's ancestor. In 1853 and 1858 the East India Company and its successor the Government of India had published notices for payment of the bond debts on tender of the notes and declared that interest would henceforth cease. The plaintiff issued a notice of demand in 1916 and instituted the present suit in 1919 against the Secretary of State who pleaded the bar of limitation. *Held* that the East India Company and its successor the Government of India had become trustees for a specific purpose under the agreement of 1824 for the discharge of the bonds issued in pursuance thereof and the suit viewed as one by the plaintiff against the defendant as trustee was not barred by limitation by reason of section 10 of the Limitation Act—*Secretary of State v. Radhika Prasad Bapuli*, 46 Mad 259 44 M L J 685 74 Ind Cas 785 A I R 1923 Mad 667

107. **Executor, Administrator**—This section will apply to an executor only if he is a trustee for a specific purpose the mere appointment of a person as an executor does not make him a trustee—*Damodar v. Dayal* 11 Bom L R 1187 *Nagarathnammat v. Namaswamy*, 5 Ind Cas 832 *Baroda v. Gajendra* 13 C W N 557 Whether an executor is a trustee for a specific purpose depends upon the facts of each case—*Damodar v. Dayal* 11 Bom L R 1187 Where the executors in a will were expressly called trustees, and were entrusted with the testator's property for certain definite purpose, *held* that this section applied—*Dhunjishaw v. Sorabji* (1896) P J 572 Where certain property was by will vested in executors to pay legacies and the residue to the testator's widow who sued for administration of her share and for a declaration that certain lease granted by the executors to themselves was void against her it was held that the suit was within this section as the property was vested in the executors in trust for a specific purpose, viz to pay legacies etc—*Nistarini v. Nundolal*, 30 Cal 369 Where a will gave no directions as to the disposition of the residue, the executors were not trustees of the residue for a specific purpose—*Nanatal v. Harlochand* 14 Bom 476

In England also the executor is not an express trustee even for a legatee—*Evans v. Moore*, [1891] 3 Ch 119 An executor is in general a constructive trustee only, although popularly described as a trustee, and while and so long as he is but a constructive trustee, the lapse of time will operate to bar the legacy—*Evans v. Moore* (supra) *In re Mackay*, [1906] 1 Ch 25 That is to say, only an express trust and not a mere constructive trust, will suffice to prevent the bar of time running against a legacy. An executor is always a trustee, in a sense for creditors and legatees because he holds the personal estate for their benefit and not for his own

benefit but such a trust is not an express trust and does not exclude the application of the bar of time—*Etans v Moore* (supra) The ordinary direction in a will to the executors (whether or not being also trustees of the will) to pay the debts and the legacies creates no trust for their payment and the mere use of the word trust in the bequest to the creditors (upon trust to pay the debts and the legacies) will not without more create a trust either for the creditors or for the legatees in either case the lapse of time will be a bar to the legacy—*Cadbury v Smith* (1869) L R 9 Eq 37 Neither an executor nor an administrator becomes an express trustee for a legatee merely because his duties as such are performed and he retains moneys on behalf of those claiming the estate He does not become a trustee by the performance of his duties *qua* executor In other words when the debts and funeral expenses are paid, he does not become a trustee for the residue—*In re Machay* (1906) 1 Ch 75

An administrator in whom no special trust is vested for a specific purpose is not a trustee—*Janardhan v Jankibati* 1 P I J 47 (649)

108 Vested —Vesting implies that some one has an estate in the subject matter of the alleged trust not merely that he has power to charge it or direct how it should be disposed of—*Dickenson v Teasdale* 1 De G & S 52 *Coverdale v Charlton* 42 Q B D 120 Therefore the directors of a company are not trustees because they are not persons in whom the property of the company may be said to have been vested under this section—*Kathiawar Trading Co v Firchand* 18 Bom 119 *Davlat Ram v Bharat National Bank* 5 Lah 27 (31) *Bank of Mullian Ltd v Hukam Chand* 71 Ind Cas 899 A I R 1923 Lah 58 So also the liquidator of a company is not strictly speaking a trustee for the creditors but is merely an agent of the company—*Knoules v Scott* (1891) 1 Ch 717 The *karta* of a joint Hindu family is not a trustee because the property cannot be said to have vested in him—*Biswanbhar v Gribala* 32 C L J 25 A minor girl inherited property from her maternal grandfather The father of the minor took charge of the property and managed it More than six years after attaining majority the daughter sued her father to recover moneys not accounted for and claimed that the suit was not barred as section 10 applied to the case Held that the father simply managed the property and there was in fact no trust in this case but by his acts he had only incurred obligations similar to those of a trustee The property did not vest in him as trustee the word vest implies that the property becomes in law the property of the trustee—*S's Thrin v U Po* 3 Rang 206 A I R 1925 Rang 289 86 Ind Cal 277 But the Madras High Court is of opinion that the word 'vesting' implies merely properly having control of the property —*Kishappa v Lakshmi* 44 M L J 431 A I R 1923 Mad 578 *Pachayappa v Srakami* 49 S L J 468 A I R 1926 Mad 109

In the case of a religious endowment in which there is a dedication

in favour of an idol, the property vests in the idol, and not in the shebait. The shebait merely holds the property as manager with certain beneficial interests regulated by custom or usage. Section 10 has no application to such a case—*Ganga Prasad v Kuladananda*, 30 C W N 415, 94 Ind Cas 235 A I R 1926 Cal 563. But where property is not dedicated to an idol, but is purchased in its name by a private individual it is not vested in the purchaser for the use of the idol, and a suit to set aside an alienation of such property will be governed by the ordinary law of limitation and not by this section—*Maharante Brojosoondery v Ram Luchmee Kunwaree* 20 W R 95 (P C).

D executed a trust deed which contained this provision: 'In order to prepare a list of my debts the trustees shall ascertain the same by looking into my books of accounts and they shall not admit any debt without *rokur hat chitta* or *hundis* bearing the signature of myself or my *gomastias* or without decree. It was held that in the absence of evidence that this deed was communicated to the creditors, it did not create a trust in favour of the creditors but enured only for the benefit of the executant that therefore the plaintiff, a creditor, was not entitled to rank as a beneficiary under it, and that it did not create a trust in his favour so as to take out of the operation of the Limitation Act a claim that otherwise fell within it—*Fink v Moharaj Bahadur*, 25 Cal 642.

It is open to a person to create a trust empowering another to go to a certain place for the purpose of requiring land for him, and the land so acquired would become vested in the trustee from the moment of its acquisition, and the trust would fasten to that land exactly as if it had been vested in the trustee at the moment of the creation of the trust. The absence of the property at the date of creation of the trust does not affect the applicability of section 10—*Harihar Prasad v Kesho Prasad*, 5 P L T Supp 1 A I R 1925 Pat 68.

109 Specific Purpose.—The phrase "trust for a specific purpose" in this section is merely a more extended mode of expressing the same idea as that conveyed by the expression "express trust" in English law—*Kistappa Chetty v Lakshmi*, 44 M L J 431, 72 Ind Cas 842, A I R 1923 Mad 378. See the English Act cited at p 72 *ante*. It is used in contradistinction to trusts arising by implication of law, trusts resulting and trusts constructive—*Bhurabhai v Bai Ruxmani* 32 Bom 394. See also *Moosabhai v Yacoobhai*, 29 Bom 267.

The words "in trust for a specific purpose" are intended to apply to trusts created for some defined or particular purpose or object as distinguished from trusts of a general nature such as the law imposes upon executors and others who hold recognised fiduciary positions. They are used in a restrictive sense and limit the character and nature of the trust attaching to the property which is sought to be followed—*Greender v Mackintosh*, 4 Cal 897. To create an express trust within the meaning

in favour of an idol the property vests in the idol. The shebait merely holds the property as manager, his interests regulated by custom or usage. See also to such a case—*Ganga Prasad v. Kuladas and others*, 3 Cas 235 A I R 1926 Cal 568. But where property is purchased in its name by a person who is not vested in the purchaser for the use of the idol, the alienation of such property will be governed by the limitation and not by this section—*Maharajah Luchmee Kunwarree* 20 W R 95 (P C).

D executed a trust deed which contained a clause to prepare a list of my debts, the trustees were to look into my books of accounts and the list was to be without *rokur*, *lat chitta* or *kunds* bearing the *gomastas* or without decree. It was held that this deed was communicated to the trust in favour of the creditors but enjoining the executant that therefore the plaintiff rank as a beneficiary under it and that the plaintiff favour so as to take out of the operation of this section that otherwise fell within it—*Fink v. Fink*.

It is open to a person to create a trust for a certain place for the purpose of requiring that property acquired would become vested in the trust, and the trust would fasten

But while the whole of the testator's property had been vested in the trustees, and after carrying out all the trusts under the will there was left with the trustees a residue undisposed of, in respect of which no trust was declared, it was held that as the whole of the testator's property had been vested in the trustees for a specific purpose, it was not necessary that the trust of the residue should be specified in words in the will, and therefore the residue should be treated as vested in the trustees. A suit by the heir to recover the residue would not be barred at all—*Mojtal v. Gourishakar*, 35 Bom 49

Where a property is bequeathed to trustees for certain purposes some of which failed or are invalid, the heirs of the testator may be barred by the ordinary law of limitation from recovering the portion undisposed of, though they might still bring a suit against the trustees to compel them to properly administer the trusts that had not failed—*Himangini v. Nobin*, 8 Cal 758

110. Resulting Trust —This section does not apply where the object of the original trust being uncertain or undiscoverable, a resulting trust arises by operation of secs 81 and 83 of the Indian Trusts Act, 1882 — *Mathuradas v Vandravandas*, 31 Bom 222. A resulting trust is not a trust for a specific purpose under this section—*Mahammad Habibulla v Sajdar Hussein*, 7 All 25, and a person claiming under a resulting trust may be barred by the ordinary law of limitation—*Ibid*, *Mohammad Ibrahim v Abdul*, 37 Bom 447 (dissenting from *Casamally v Currimbhoy*, 36 Bom 214, in which the Judge had made no distinction between a resulting trust and a trust for a specific purpose and had held that a person claiming under a resulting trust would not be barred by any length of time unless the trustee asserted an adverse title for more than twelve years)

Where the specific purpose for which the defendant became a trustee, fails or is invalid, he ceases to be a trustee and this section has no application. Thus, where the property of a deceased Hindu vests in an executor in trust for the beneficiaries under the will, and the bequest fails, the executor does not hold the property in trust for the heir, and such possession by the executor becomes adverse to the heir—*Kherodmoney v Doorgamoney*, 4 Cal 455

Where a will vested the whole of the testator's property in executors for certain purposes which eventually could not be carried out, it was held that the executors were not trustees for any specific purpose within the meaning of this section—*Vandravandas v Cursonadas*, 21 Bom. 646

111. Implied Trust —Implied trusts, or such trusts as the law would infer merely from the existence of particular facts or fiduciary relations are excluded by this section—*Kherodmoney v Doorgamoney*, 4 Cal 455; *Lakhray v Assamal*, 8 S L R 132

112. Constructive Trust —Section 10 applies to cases of what in English law are called express trusts, and not to constructive trusts. The

P carried on a money lending business, and entrusted the business to his brother-in-law S, who dealt with the property of P until P's death and even after that date remained in possession of all his property. The property consisted of money bonds, promissory notes and mortgage deeds. Shortly before his death, P had directed S to hold his property for the benefit of his wife and daughter, and it also appeared in evidence that when S died in 1912 he informed P's wife and daughter that his (S's) son would continue to hold the property on their behalf. P's daughter brought the present suit in 1921 against S's son for an account. The contention was that the suit was barred by limitation. *Held* that the property had been legally vested in P in trust, and the specific purpose of the trust was to carry on the money-lending business and to increase the estate by addition of profits by way of interest and to hand over the property when called on to P. Section 10 therefore applied and the suit was not barred—*Pachaiyappa v Sivakami*, 49 M L J 468, A I R 1926 Mad 109, 91 Ind Cas 671. L was a partner in the firm of R, and as such was entitled to 35 shares of the Hongkong Mill and to a certain share of the commission earned by the firm as agents of the Mill. L retired from partnership and afterwards died, whereupon the present suit was brought by his executors against R to recover the share of L in the agency commission earned by the firm of R as agents of the Hongkong Mill. *Held* that L's share of the commission had become vested in trust for a specific purpose in the hands of R within the meaning of this section, and therefore the plaintiff's suit was not barred by limitation—*Narrondas v Narrondas*, 31 Bom 418. (The Rangoon High Court in 3 Rang 206 doubts the correctness of this decision and says that it is clearly a case of constructive trust.) Where the amount of *palla* or dowry had been made over by the husband's father to the custody of the wife's father, at the time of marriage in accordance with the usual practice prevailing in the caste, *held* that there was a trust of the fund for a specific purpose within this section—*Bhurabhai v Bai Ruxmani*, 32 Bom 394. A partition-deed entered into between two brothers recited that their deceased elder brother had entrusted a sum of money to them, and one of the two brothers undertook to pay the amount to the son of the deceased brother on his attaining majority, together with interest. *Held* that there was an express trust created in favour of the deceased brother's son, and a suit brought by him more than three years after attaining majority was not barred—*Mad. Mathar v Kara Routhar*, 20 L W. 546, A. I R 1924 Mad 920, 85 Ind Cas 508.

An executor who by the will is made an express trustee for certain purposes as regards some of the properties, cannot be regarded as "a trustee for a specific purpose" as to the residue of the properties for which no direction was given to the executor and no trust was declared—*Nanalai v. Harlochand*, 14 Bom. 476.

But where the whole of the testator's property had been vested in the trustees, and after carrying out all the trusts under the will there was left with the trustees a residue undisposed of, in respect of which no trust was declared it was held that as the whole of the testator's property had been vested in the trustees for a specific purpose, it was not necessary that the trust of the residue should be specified in words in the will, and therefore the residue should be treated as vested in the trustees. A suit by the heir to recover the residue would not be barred at all—*Mojilal v Gourishankar* 35 Bom 49

Where a property is bequeathed to trustees for certain purposes some of which failed or are invalid, the heirs of the testator may be barred by the ordinary law of limitation from recovering the portion undisposed of, though they might still bring a suit against the trustees to compel them to properly administer the trusts that had not failed—*Hemangini v Nobin*, 8 Cal 758

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Where the specific purpose for which the defendant became a trustee, fails or is invalid, he ceases to be a trustee and this section has no application. Thus, where the property of a deceased Hindu vests in an executor in trust for the beneficiaries under the will, and the bequest fails, the executor does not hold the property in trust for the heir, and such possession by the executor becomes adverse to the heir—*Kherodmonty v Doorgamoney*, 4 Cal 455

Where a will vested the whole of the testator's property in executors for certain purposes which eventually could not be carried out, it was held that the executors were not trustees for any specific purpose within the meaning of this section—*Vandravandas v Cursonadas*, 21 Bom, 646

111. Implied Trust.—Implied trusts, or such trusts as the law would infer merely from the existence of particular facts or fiduciary relations are excluded by this section—*Kherodmoney v Doorgamoney*, 4 Cal 455, *Lakhray v Assamal*, 8 S L R 132

112. Constructive Trust.—Section 10 applies to cases of what in English law are called express trusts, and not to constructive trusts. The

doctrine of the well known case of *Soar v Ashwell*, [1893] 2 Q B 390, viz that the rule of limitation will not be applied to certain kinds of constructive trusts, has no applicability to India—*Raja of Ramnad v Ponnusami*, 44 Mad 277 (281), 40 M L J 52, 1921 M W N 37. *Ma Thein v U Po*, 3 Rang 206, A I R 1925 Rang 289, *Krishna Pallar v. Lakshmi Ammal*, 45 Mad 415 42 M L J 119. Thus, where a person directs another to acquire property for him (the person directing) and furnishes some money for the purpose, but after some time he withdraws from the venture completely, but the person directed continues his exertions and entirely as the result of those exertions acquires the property, there is only a constructive trust and section 10 does not apply—*Harihar Prasad v Kesho Prasad (Dumraon Case)*, 5 P L T Supp 1, A I R 1925 Pat 68. In one Allahabad case however which was really a hard case, the principle of this section was applied to a constructive trust. In that case, B and D, father and son, were jointly entitled to a moiety of certain property, B's brother E, and E's son K were jointly entitled to the other moiety. B and D were transported for life. Thirty years afterwards (B having in the meantime died), D returned from transportation and asserted his right to a moiety against a person denying his title from E and K, who had taken possession of the whole. It was held, looking to all the circumstances of the case, that E and K had taken possession subject to a constructive trust in favour of B and D, and that accordingly D was entitled to assert his right and no limitation could affect it—*Durga Prasad v Asa Ram*, 2 All 361. This case should not be treated as laying down any general principle to be applied to all cases of constructive trusts and Straight J who gave judgment in this case admitted in a subsequent case (5 All 608) that his remarks in the previous case should be taken as confined to the particular circumstances of that case.

In England also the bar of time runs in favour of a trustee where he is only a trustee constructively—*Hovenden v Lord Annesley*, (1806) 2 Sch & Lef 633. So also, the bar of time runs in favour of a trustee who is only a trustee by implication of law upon some doubtful equity—*Tounshend v Tounshend*, (1783) 1 Br C C 550. Where the trust is not an express trust but is only a constructive trust, or the alleged express trust is in fact the point in dispute, the time runs in favour of the trustee—*Attorney-General v Fishmongers' Co*, (1841) 5 My & Cr 16, *Beckford v Wade*, (1811) 17 Ves 87, *Tounshend v Tounshend* (supra).

113. **Trustee not validly appointed**—This section applies even though the trustee was not validly appointed, and the defendant cannot plead the bar of limitation—*Subramania v Subba*, 25 M L J. 452.

114. **Legal representatives**—A new trustee succeeding to the office of a former trustee does not succeed to him personally and cannot be said to be his legal representative within the meaning of this section—*Mani Akum v. Thanikachalam*, (1916) 2 M W N. 87.

115 Assigns for valuable consideration—Section 10 of the Limitation Act does not apply to a suit against those who assert their right under a *bona fide* purchase for value—*Maniklal v. Manjivshi* 1 Bom 269 *Hait Ram v. Durga Prasad* 5 All 608 The period of limitation for a suit to follow property in the hands of assigns for valuable consideration is prescribed by Art 134

The meaning of this section is to declare that as a general rule trust properties shall not be subject to any law of limitation that no length of time shall bar an action to recover such property but that when trust property finds its way into the hands of an assignee for valuable consideration the ordinary law of limitation shall apply the assignee shall have the same benefit as an ordinary purchaser of property not trust property would have—*Chintamani v. Sarup* 15 Cal 703

The words assigns for valuable consideration include lsees and mortgagees as well as purchasers—*Behari v. Muhammad* 20 All 482 (F B) at p 485 It also includes auction purchasers A suit against an auction purchaser acquiring trust property for valuable consideration at a sale in execution of a decree is subject to the ordinary rule of limitation—*Chintamani v. Sarup* 15 Cal 703 *Subbaya v. Mahammad Mustapha* 32 M L J 85 affirmed by the Privy Council in 46 Mad 751

A gratuitous transferee is not an assignee for valuable consideration and a suit for following the property in his hands is not barred by any length of time—*Venkataswala v. Srinaga Ammal* 38 Mad 1064

The defendant purchased from one of two co trustees of a temple the right to manage the affairs of the temple and enjoy certain land which formed the endowment of the temple and held possession of the land for more than twelve years It was held that a suit by the other trustee to recover the land was barred by limitation under Article 134 the defendant being an assign for valuable consideration—*Kannan v. Nilakandan* 7 Mad 337

Where the plaintiffs who were managers of a temple made a gift of a portion of the temple property to the defendants in consideration of the latter performing certain religious services at the temple it was held that the latter were assigns for valuable consideration—*Ranacharya v. Srinivasacharya* 20 Bom L R 441

To be an assign for valuable consideration for the purposes of this section or of Art 134 good faith is not necessary—*Subbaya Periyaram v. Mahammad Mustapha* 32 M L J 85 *Ram Kanai v. Sri Sri Hari Narayan* 2 C L J 546 The words 'good faith' which occurred in this section in the Act of 1871 have been omitted in the Acts of 1877 and 1908 See this subject fully discussed in Note 564 under Article 134

117 Following in his hands such property—The words for the purpose of following in his or their hands such property mean 'for the purpose of recovering the property for the benefit of the trust in respect

of which it had been given"—*Baluant Rao v Puran Mal*, 6 All 7 (P C), therefore where there is no question whether the property is being applied or not to the purposes of the trust, and the suit is for the enforcement of the plaintiff's *personal right* to manage it, this section does not apply—*Ibid*

This section does not apply to a suit brought on failure of the object of a trust to recover the money remaining in the hands of the trustee, for the plaintiff's own benefit and not with the object of having such money applied towards the original purposes of the trust—*Jasoda v Parmanand*, 16 All 256

A suit brought to vindicate the rights of the plaintiffs as co trustees with the defendants and to protect their own interests, and not, except indirectly, the interests of the temple, cannot be regarded as falling within this section—*Ranga v Baba* 20 Mad 398

A suit to remove the trustees of certain debuttur property, to establish the plaintiff's claim to be appointed trustee, and to recover property improperly dealt with by the defendant in breach of the trust is one for "the purpose of following the property in the hands of trustees" and therefore limitation does not run—*Sreenath v Radha Nath*, 12 C L R 370

A suit by the trustee to recover the property of a temple from an ex-trustee who has been dismissed by the temple committee, is within this section—*Virasami v Subba* 6 Mad 54, *Subrahmanya v Subba Naidu*, 25 M L J 452

A suit against trustees for the purpose of charging certain property with the trusts declared by the author of the trust in respect of that property, and for an account is a suit to follow property and as such is not barred by any lapse of time—*Hurro Coomares v Taran* 8 Cal 766

Where a testator's grand-daughter brought a suit as his heir and not under the will against the executors of the will for a declaration that she was absolutely entitled to the property of her grandfather and for an account, it was held that the suit was not one for the purpose of *following such property in the hands of the executors or trustees*, and that as the plaintiff took no interest in the property under the will and the executors were not trustees for her and the property did not vest in them for any specific purpose in her favour, this section did not apply and she was only entitled to six years accounts—*Ayeshabai v Ebrahim*, 32 Bom 364

A suit to prevent a specific endowment from being diverted from its legitimate object and to re attach it to that object is within this section—*Sathappayar v Periasami*, 14 Mad 1, *Advocate General v Bai Panjabai*, 18 Bom 551

A suit against the manager of a Hindu temple for recovering money misappropriated by him is under this section—*Seihu v Subramanya*, 11 Mad 274.

The present manager of a Matt is entitled to sue the assigns of his

predecessor in office on the ground that the assignment was in violation of his trust, and such a suit falls within this section—*Sathinama v Saratanabaji*, 18 Mad 266 *Mahamed v Ganapati*, 13 Mad 277; *Jamal v. Murgaya*, 10 Bom 34

A suit for a declaration and possession of certain properties instituted by the plaintiff against his father whom his maternal grandfather had appointed trustee for the benefit of the plaintiff and of his mother (who died about 17 years before suit) was not barred by limitation, as it came under this section—*Sethu v Krishna*, 14 Mad 61

A suit by the *dawaries* of a temple for recovery of certain dues claimed by them as payable as remuneration in respect of their services in connection with the temple is not a suit covered by this section. The plaintiffs are no doubt entitled out of the proceeds of the property belonging to the temple, to certain payments in the nature of wages and remuneration, but they cannot be said to be bringing the suit for the purpose of following the trust property in the hands of the trustee—*Sri Sri Baidyanath v. Har Datt*, 5 Pat 249, 7 P L T 465, A I R 1926 Pat 205

"Or the proceeds thereof" —It is not necessary that the suit should be to follow the original trust property only, for if the trust property has been tortiously disposed of by the trustee the *cestui que trust* may attach and follow the property that has been substituted in the place of the trust property, so long as the metamorphosis can be traced—*Taylor v Plumer*, 3 M & S 574

117A. Suits under this section —Sec 10 of the old Act did not apply to a suit for account. Where the object of a suit by a *cestui que trust* was not to follow trust property in the hands of the trustee, but only to have an account of the property or the proceeds, section 10 of the old Act did not apply and such a suit was governed by Art 120—*Saroda Prasad v. Brojo Nath*, 5 Cal 910, *Shapurji v Bhikaji*, 10 Bom 242; *Barada v. Gajendra*, 13 C W N 557. But the present Act extends the application of this section to suits for accounts

In England also, actions against express trustees claiming an account of the trust property cannot be barred by the Statute of Limitation—*Rocheffoucault v Bowstead*, [1897] 1 Ch 196 (208), *North America Co. v Watkins*, [1904] 1 Ch 242

This section applies only to a suit for an account of the property which actually came into the hands of the trustee. But where it is sought to render a trustee liable for property which but for his wilful default or negligence would have come into his hands, the ordinary law of limitation applies, and it is not saved by this section—*Tholasingam v Vedachelajja*, 41 Mad 319.

This section prevents the period of limitation running, not only where the defendant had actually received money as trustee for which he accounted, but also where he held money in another capacity

ought to have held as trustee. In such a case he cannot be heard to say that he held it in the other capacity and not in the capacity of a trustee and therefore in such a case section 10 will apply and prevent him from relying upon the Limitation Act. But a suit based on the failure of a trustee to reduce trust property into possession is barred under this Act notwithstanding sec 10. A trustee is not liable for the acts or defaults of his predecessors. Trustees are relieved from indefinite liability except in cases of fraud or fraudulent breach of trust or cases in respect of trust property or the proceeds thereof still retained by trustees or previously received by them and converted to their own use—*Doraiswami v Adikesavaulu* 1922 M W N 620 A I R 1922 Mad 409 70 Ind Cas 87.

118 Suits not within this section.—A claim to vindicate the personal right of a trustee to the possession or management of an immoveable property against another person claiming such right in the same character is not governed by this section—*Harimsha v Naffan* 7 Mad 417 *Giyana Sambandha v Handasami* 10 Mad 375 *Nalakandan v Padmanabha* 14 Mad 153 *Sankaran v Krishna* 16 Mad 456 *Nalle Pujari v Radha Binode* 3 P L J 327 *Ambalavana Pandara v Vinakshy* 28 M L J 277.

Where trust property was sold as the personal property of the trustee at an execution sale and the auction purchaser was in possession for more than 12 years a suit by the successor of the original trustee against the purchaser for recovery of the property does not fall under this section but is barred by the 12 years rule—*Subbaya Pandarasi v Malanmad Mustapha* 32 M L J 85 affirmed by the Privy Council in 46 Mad 751.

A suit not to enforce the trusts of a will but to have the disposition declared invalid is not a suit under this section—*Hemagiri v Robin Chand* 8 Cal 788 (800).

This section does not apply to a suit brought to set aside the trust specified in a trust deed—*Cowasji v Rustomji* 20 Bom 511.

11 (1) Suits instituted in British India on contracts entered into in a foreign country are subject to the rules of limitation contained in this Act.

(2) No foreign rule of limitation shall be a defence to a suit instituted in British India on a contract entered into in a foreign country, unless the rule has extinguished the contract and the parties were domiciled in such country during the period prescribed by such rule.

119 Principle.—Sub-section (1) is a legislative enactment of the rule of international jurisprudence that all suits must be brought within the period prescribed by the local law of the country where the suit is brought,

otherwise the suit will be barred —Story's Conflict of Laws Sec 577, cited in *Lalloobhoy v Ruckmaboye* 5 M I A 234 (at p 267) 'It is a rule of universal (or almost universal) application that remedies as distinguished from rights are to be pursued according to the law of the place where the action is instituted which law is commonly called the *lex fori*. And the reason of the rule is because Courts of law being instituted by every nation for its own convenience the nature of the remedies available therein and the times and modes of the proceedings therein are regulated by that nation's own views of what is just and proper or expedient and it is not obliged out of any comity to other countries to depart (in a matter of procedure) from its own notions of what is just or proper or expedient. And therefore where an action is brought in one country upon a contract made in another a plea of the statute existing in the place of the contract is not a good bar in the general case —Banning 3rd Edn p 11 *Huber v Steiner* (1835) 2 Bing N C 202 *Pardo v Bingham* (1870) L R 4 Ch App 735 *Harris v Quine* (1870) L R 4 Q B 653 *Alliance Bank of Simla v Carey* (1880) 5 C P D 429 Courts of law are maintained by every nation for its own convenience and benefit and the nature of the remedies and the time and manner of the proceedings are regulated by its own views of justice and propriety and fashioned by its own wants and customs —Story's Conflict of Laws Sec 581 The rule which applies to the case of contracts made in one country and put in suit in the Courts of another country appears to be this that the interpretation of the contract must be governed by the law of the country where the contract was made the mode of suing and the time within which the action is to be brought must be governed by the law of the country where the action is brought —*Trimbey v Vignier* 1 Bing N S 151 While the Courts of almost all civilized countries entertain causes of action which have originated in a foreign country and adjudicate upon them according to the law of the country in which they arose yet such Courts respectively proceed according to the prescription of the country in which they exercise jurisdiction —*Lalloobhoy v Ruckmaboye*, 5 M I A 234 (at p 266) In matters of procedure all mankind are bound by the law of the *forum*—*Lopez v Burslem* 4 Moo P C 300

Although this section speaks of suits on contract only yet the principle of this section applies to all suits and proceedings Thus the execution of decrees of Courts of Native States transferred to a Court of British India for execution is subject to the law of limitation which prevails in the latter Court—*Hukum v Gyanendar*, 14 Cal 570

120 Sub section (2) —This sub section also follows the English law, according to which a foreign law of limitation is preferred to the *lex fori* on two conditions (1) that the foreign law extinguishes the right or the obligation itself and (2) that both the parties have resided in the country

where such law prevails for the whole of the prescribed time See Story's Conflict of Laws, sec 582

It is immaterial whether the foreign law allows a longer or a shorter period Provided that the foreign law does not extinguish the *right* under the contract, no effect can be given to such law—*Huber v Steiner*, 2 Bing N S 202 Where the *remedy* only is barred by the foreign law, a suit may be instituted in the Court of British India if it is not then barred according to the Indian law of limitation—*Nallalam v Ponnusami*, 2 Mad 400, *Narayan v. Magiram*, 6 Bom 103

PART III

COMPUTATION OF PERIOD OF LIMITATION

12 (1) In computing the period of limitation prescribed for any suit, appeal or application the day ^{Exclusion of time in} legal proceedings ^{from which such period is to be reckoned} shall be excluded.

(2) In computing the period of limitation prescribed for an appeal an application for leave to appeal, and an application for a review of judgment the day on which the judgment complained of was pronounced, and the time requisite for obtaining a copy of the decree sentence, or order appealed from or sought to be reviewed, shall be excluded.

(3) Where a decree is appealed from or sought to be reviewed, the time requisite for obtaining a copy of the judgment on which it is founded shall also be excluded

(4) In computing the period of limitation prescribed for an application to set aside an award the time requisite for obtaining a copy of the award shall be excluded

The periods of limitation prescribed in Schedule I are to be computed subject to the provisions contained in this section—Dhonesur v Ray Goode, 2 Cal 336 (F B)

121 Sub section (1) —The meaning of the first paragraph is that the date of accrual of the cause of action should be excluded—*Chinna v Ramaswamy* 4 M H C R 409 *Ganapath v Satharama* 10 Mad 292 'The reason of the rule appears to be this namely the law does not as a rule regard the fraction of a day so much so that the date of the execution of a deed does not mean the hour or the minute of the day when the deed was delivered, but means the whole day and similarly the day of the death of a testator is the day of the death and if it is necessary to reckon six months after the death, those six months will commence with the day next following the death —*Banning* 3rd Edn p 20 *Lester v Garland*, (1808) 15 Ves 248 *Webb v Fairmaner*, (1838) 3 M & W 473 *Chambers v Smith* (1843) 12 M & W 2 *In re Railway Sleepers Co* (1883) 29 Ch D 204

In computing a calendar month or year, it is sufficient to go from one month or year to the corresponding day in the next, and to exclude from

computation the day from which the month or the year is calculated, so that two days of the same number are not included—*Deb Narain v Ishan*, 13 C L R 153

In a suit on a bond where a day is specified for payment, the period of limitation is to be computed from and exclusive of the day so specified, as being the day on which the right to sue accrued—*Ram Churn v Ina*, 24 W R 463

In case of a pro note, the date on which the pro note is executed will be excluded—*Munshi Abdul v Tarachand*, 6 B L R 292

When a debt is acknowledged in writing, a new period of limitation runs under sec 19 from the date of the acknowledgment, and the day on which the acknowledgment was signed must be excluded in computing the new period of limitation, under subsection (1) of section 12—*Jainarayan v Vithoba*, 6 N L J 281 A I R 1923 Nag 143 71 Ind Cas 556

The day on which a minor attains his majority must be excluded under this section—*Jugmohan v Luchmeshur*, 10 Cal 748 (751)

In calculating the period of limitation for appeals and applications, the day on which the judgment was pronounced or order was made should be excluded—*Debicharan v Mehdi Hussain*, 1 P L J 485 (489) *Gujar v Barve* 2 Bom 673 See sub section (2)

122 'Time requisite for copy —The 'time requisite for obtaining a copy does not mean the time requisite by reason of the carelessness or negligence of the applicant That is, the delay caused by the negligence of the party in applying for a copy or in paying the money required for a copy cannot be excluded from computation—*Parati v Bhola*, 12 All 79 In determining what is the 'time requisite' in subsection (2) of sec 12 the conduct of the appellant must be considered, and no period can be regarded as requisite under the Act which need not have elapsed if the appellant had taken reasonable and proper steps to obtain a copy of the decree or order—*Pramatha v Lee*, 49 Cal 499 (P C), 27 C W N 156, 37 C L J 86 Thus, where according to the rules of the High Court (original side) it is incumbent upon the appellant to make an application for the drawing up of the order appealed against and the party who wanted to prefer an appeal applied for a copy of the order, but did not put in a requisition for the order being drawn up, and it was the respondent who applied for the drawing up of the order, held that he has not taken reasonable and proper steps to obtain a copy of the order, and he is not entitled to a deduction of the period from the date of the application for a copy of the order up to the date of obtaining the copy—*Kamruddin v. M N Mitter*, 52 Cal 342, A I R 1925 Cal 735 But a party is not to lose his right of appeal by reason of the neglect or delay of the officials who issue copies or who are required to give notice when such copies are ready—*Sheegobind v Ablakhi*, 12 All 105

When the plaintiff allowed five days to expire after the decree was

agreed before applying for a copy and did not file his appeal, after so obtaining a copy at the earliest opportunity possible but two days after, such a delay being entirely unaccounted for was not held to be a time requisite for obtaining a copy of the decree — *Ramey v Broughton*, 10 Cal 632

This section does not authorise the deduction of time occupied in getting a translation of the decree. Thus where the decree of the first Court was drawn up in English but the appellant wanted and obtained a vernacular copy of the decree and filed it along with the memorandum of appeal in the lower Appellate Court it was held that the time spent in obtaining the vernacular copy could not be excluded in computing the period of limitation for the presentation of an appeal in as much as the practice of the lower Appellate Court required an English copy of the decree to be filed with the memorandum and not a translation thereof—*Mukhammad Amin v Chirogh* 124 P L R 1917, 39 Ind Cas 617. But if there has been extreme delay in the office in furnishing the translation, such delay may be a ground for extending the time—*Daya Kaur v Amrao Kaur* 145 P R 1893

Similarly the time occupied in obtaining a copy of the decree of the Court of first instance cannot be excluded in computing the period of limitation for a second appeal since no such copy need be produced along with the memorandum of second appeal—*Pirathi v Venkatramanayyan*, 4 Mad 419 (B B). See Note no 134 *infra*

123. Computation of time requisite for obtaining copies. —The question as to when the period requisite for taking copies should begin, that is, whether on the day the application for copy is made or on the day on which the folios and fees for the copy are deposited is a matter to be determined by the practice of the Court—*Nobin v Brojendra*, 12 C L R 541. The general practice is to count the period requisite for copies from the date of the application for the copy and not from the date of deposit of the folios. Thus where a party applied for a copy of the decree on the 15th October and the information as to the number of folios required was supplied on the 18th November and on the same day the party put in the folios, held that the time requisite for obtaining the copy of the decree was to be counted from the 15th October—*Kali Sankar v Baikanta*, 7 C W N 109. Where an application for copies of judgment and decree was struck off for non-deposit of stamp papers and a subsequent application for restoration of the previous application was granted, the subsequent application was a continuation of the former one—*Ramanuja v Narayana* 18 Mad 374. But delay in paying the fees after the estimate of the cost of copying has been communicated to the applicant counts against him. In such a case the time requisite will be counted from the date of deposit of the fees. Thus where the applicant who had applied for a copy of the decree on the 15th April had notice on the 16th of the amount of the

mate, but delayed until the 19th April to pay into Court the money required for making the copies, held that these four days could not be deducted as time requisite for obtaining copies—*Parbati v Bhola*, 12 All 79 (82), *Ram Asray v Sheo Nandan* 1 P L J 573, 35 Ind Cas 868, *Kaverisai v Chandrabhagabai*, 4 C P L R 188, *Deoki Lal v Ramanand Lal*, 5 P L J 701 (705), *Topandas v Manager*, 5 S L R 47, 10 Ind Cas 210.

Under subsection (2) the day on which the judgment is pronounced and the time requisite for obtaining copies are excluded from computation. But where an application for copies is made on the same day the judgment is pronounced that day cannot be excluded twice, once as the day on which the judgment was pronounced, and the second time as one of the days requisite for obtaining copies. In such a case, the day on which the judgment is pronounced is excluded first, and then the time requisite for obtaining copies has to be excluded—*Ata Muhammad v Pir Khan*, A I R 1924 Lab 399 *Salam Singh v Hwa*, 13 N L R 89 40 Ind Cas 425.

According to the practice of the Patna High Court, when several suits are disposed of in one judgment in an appeal to the High Court only one copy of the judgment is required to be filed, but the time taken for obtaining a copy of the judgment will be deducted in computing the period of limitation for each of the several analogous appeals—*Bibi Umatul v Ram Charan* 1 P L T 562 58 Ind Cas 991.

The time requisite for obtaining a copy ends on the date when the copy is ready for delivery and not when the applicant chooses to apply for its delivery or actually takes delivery—*Gopal v Brojo Behary*, 9 C L R 293 *Parbati v Bhola*, 12 All 79, *Kali Sankar v Baskanta*, 7 C W N 109. The day on which the copies were actually delivered cannot be excluded in favour of the appellant, in addition to the day on which the copies were made ready, in the absence of any special circumstances to justify such a course, because the appellant might have obtained those copies on the day on which they were ready if he had acted with due diligence—*Tolaram v Jaffer Khan*, 10 S L R 165. therefore the appellant was not entitled to reckon out the 3 days during which the copy of the lower Court's judgment lay undelivered—*Nur Muhammad v Ram Das*, 1919 P L R 4 50 Ind Cas 760.

Where the appellant was instructed to attend Court on a particular day to ascertain whether the copies were ready or whether any further advance of copying fees was required, and the appellant did not so attend, and did not on that day take any particular steps towards obtaining the copy, it was held that that day could not be deducted from the limitation period as time requisite for obtaining the copy—*Lachman v Kalya*, 12 N L R 66, 34 Ind Cas 458.

124 Court closed when copy ready —If the copying department of the Court is working during the vacation to make up arrears, under the special order of the District Judge, and the copy of the decree is ready

for delivery on one of these days and notice is posted on the notice-board that the copy is ready the appellant is not bound to take cognisance of this notice or to take delivery of the copy until the Court re-opens after the vacation he is entitled to deduct the time up to the date of re-opening of the Court—*Akub Chand v. Harmukh* 34 All 41 8 A L J 1095 12 Ind Cas 183

But where by a Gazette notification arrangements were made for granting copies during the vacation the copies must be taken delivery of during the vacation and the period between the date on which the copies were ready for delivery during the vacation and the day of reopening of Court will not be deducted as time requisite for obtaining copies—*Appalaswami v. Narayanaswami* 36 M L J 62 49 Ind Cas 626 *Adir Mahideen v. Syed Abubacker* 36 M L J 122 50 Ind Cas 518

125 Copy sent by post.—Where a copy of the judgment and decree is applied for and sent by post in accordance with the rules for the supply of copies through the post the period intervening between the completion and the despatch of the copies should be included in the time requisite for obtaining the copies—*Krishna v. Balia* 8 N L R 11 14 Ind Cas 403 *Paga v. Sadasheo* 8 N L R 172 17 Ind Cas 624 *Raghu v. Mandga* 10 N L R 130 26 Ind Cas 819 *Alla Bukhsh v. Municipal Committee* 27 P L R 18 92 Ind Cas 966 *Ghulla Singh v. Sohan Singh* 3 Lah. 280 A I R 1912 Lah 219 69 Ind Cas 818 *Iqbal Jehan v. Mathura* 6 O L J 660 54 Ind Cas 831 (Oudh) Even though the applicant could have got his copies several days earlier by presenting himself at the Court he does not forfeit his claim to indulgence because he arranged to have the copies sent by post. These days cannot be excluded from computation under sec 12 but they may be excluded in considering the question of indulgence under sec 5—*Sripal v. Hubbard* 2 O W N 678 90 Ind Cas 115 A I R 1925 Oudh 643 See also *Madan v. Puran* 91 Ind Cas 6 (Lah) The applicant for copy of decree was not told when the copy would be ready and after the copy was ready it was kept in the office for 15 days and afterwards sent by post to the applicant who filed the appeal on the very day he received the copy. Held that the appeal ought to be accepted—*Madan v. Puran* 26 P L R 738 91 Ind Cas 6 A I R 1926 Lah 84

126 Separate applications for copies of judgment and decree.—Where a party applies for copies of judgment and of decree at different times the aggregate of the periods may be deducted under sub-sections (2) and (3)—*Selamban v. Ramanadhan* 33 Mad 256 *Vellaiyammal v. Koolayanna* 41 M L J 273 *Maimullan and Co Ltd v. Cooper* 43 Bom 292 25 Bom L R 1309 *Timappa v. Manjaya* 48 Bom 433 26 Bom L R 362 A I R 1924 Bom 425 *Jadunandan v. Hanuman*, 4 P L 619 77 Ind. Cas 701 *Simhulu v. Secretary of State* 112 M W N

17 Ind Cas 393 The Punjab Chief Court once held that the mere fact that a party applied for copies of judgment and decree at different times, did not entitle him to a deduction of both the periods. An appellant could deduct only the time actually requisite for obtaining copies. The question whether, when it was open to a party to apply for both copies of judgment and decree at once, he could apply first for one and then for the other and claim to exclude the two periods as both being requisite, was held to be a question of fact to be decided on the circumstances of the case, and not a question of law—*Sher Singh v Prem Raj*, 100 P R 1918, 48 Ind Cas 31. But in more recent cases, the Lahore High Court has held that the appellant is not bound to ask for both copies in the same application and he is entitled to apply for copies of the judgment and the decree at two different periods, and to deduct the time requisite for obtaining a copy of the decree as well as the time requisite for obtaining a copy of the judgment under sub-sections (2) and (3) respectively—*Ali Muhammad v Nathu*, 163 P R 1919, 54 Ind Cas 879 1 Lah L J 106, *Kanshi Ram v Karam Narain*, 3 Lah L J 166.

Where some portions of these two periods overlap each other, the time overlapped should be excluded only once—*Rajani Kanta v Kali Mohan*, 21 C W N 217, 38 Ind Cas 66 *Rangan v Md Ishaq*, 47 All 509 23 A L J 342 *Raman Chetty v Kadirvalu*, 8 M L J 148 *Macmillan and Co Ltd v Cooper*, 48 Bom 292, 25 Bom L R 1309, A I R 1924 Bom 185.

Applications for copies of the judgment and the decree must be made before the expiry of the time for filing an appeal. Now, it is settled by authorities that the applications made at different times entitle the appellant to take advantage of the time occupied in obtaining copies of both judgment and decree. Hence if the time requisite for obtaining a copy of the judgment extends the time of limitation then the application made for obtaining a copy of the decree after the time fixed by the law of limitation for filing an appeal but before the extension of time allowed by reason of time required for obtaining the copy of the judgment expires, will entitle the appellant to extension of time for obtaining the copy of the decree—*Jadunandan v Hanuman*, 4 P L T 619 77 Ind Cas 701, A I R 1924 Pat 113 *Ramzan v Md Ishaq*, 47 All 509, 23 A L J 342, 37 Ind Cas 484, A. I R 1925 All 436 *Rajani Kanta v Kali Mohan*, 21 C W N 217 *Selamban Chetty v Ramanadhan*, 33 Mad 256, 21 M L J 152, 4 Ind Cas 301 *Din Dayal v Rameshwar*, 18 O C 74, 2 O L J 159, 28 Ind Cas 366. But the Nagpur Court has laid down an inflexible rule that if the appellant applies first for a copy of the judgment and obtains it within the schedule period of limitation prescribed for an appeal, and then applies for a copy of the decree after the expiry of that period, the time occupied for obtaining a copy of the decree shall not be excluded, in the absence of satisfactory explanation as to why he did make two separate

applications for copies—*Parasram v Likhon* 7 N L R 67, 10 Ind Cas 566

127 Non-signing of decree —If the decree appealed against is not signed until a date subsequent to the date of delivery of judgment, the period between the date of the judgment and the date of signing the decree shall not be excluded unless the appellant has applied for a copy of the decree *before it is signed* and has been delayed by reason of the decree not having been signed—*Parbati v Bhola* 12 All 79 *Topandas v Manager*, 5 S L R 47 10 Ind Cas 210 *Akhudad v Moriohkan* 9 S L R 193 The principle is that the time requisite for copy does not begin until an application for a copy has been made and the period during which the decree remained unsigned (i.e. the period between the date of judgment and the date of signing the decree) cannot be excluded unless the application for a copy of the decree has been made before it is signed, therefore, where the appellant has made no application for copies of judgment and decree until after the expiry of the period of limitation prescribed for filing the appeal he is not entitled to ask the Court to deduct the period between the date of the judgment and the date of signing the decree, because in such a case it can not be said that he was prevented from filing his application for copy by reason of the decree not being signed —*Becht v Ahsanullah* 12 All 461 (F B) *Jyotindra v Lodna Colliery Co Ltd*, 6 P L J 350 (F B) *Harish Chandra v Chandpur Ca Ltd*, 39 Cal 766, 15 Ind Cas 59 It appears to me upon general principles that it would be defeating the object of limitation to allow the would be appellant to sleep over his right of appeal for more than the limitation period and then by the accidental or unavoidable delay in the decree being prepared, to claim extension of the period of limitation for appealing from a decree for obtaining a copy of which he had not taken even the first step by filing an application therefor The words requisite' and obtaining' as they occur in the context seem to assume that some definite step ancillary to the obtaining is not only intended to be taken but has already been taken The word obtain' means according to Webster's Dictionary, to get hold of by effort to gain possession of to acquire' If at the time when the application for copy is made the decree is not ready, he will of course be entitled to the allowance of the time during which the decree remained unsigned the reason being obvious that the act of obtaining has already commenced and the delay in such a case could not be referred to any omission or neglect on his part But when he has made no application to obtain a copy, and the decree remains unsigned for a portion of or the whole period of limitation, he cannot claim the benefit of a matter which in no sense and to no extent frustrated or retarded any endeavour on his part to obtain a copy of the decree, the endeavour itself not having yet commenced"—*Becht v Ahsanullah*, 12 All 461 (at p 471) F B. See also *Raja Mahomed v Lal Bahadur*, 12 O L J.

444, 2 O W N 420 A I R 1925 Oudh 600 The Nagpur Court has recently laid down that the only periods that can be excluded under sub section (2) are the day on which the judgment is pronounced, and the time requisite for obtaining a copy of the decree No other period can be deducted even on the highest principles of equity, and therefore the time between the pronouncement of the judgment and the signing of the decree cannot be deducted—*Dindayal v Anops*, 22 N L R 60, A I R 1926 Nag 349

In an earlier Full Bench case of the Calcutta High Court it was held that the time between the date of judgment and the date of signing the decree must be deducted from computation even though an application for a copy of the decree was made after it was signed—*Bani Madhub v Matungini*, 13 Cal 104 (F B) But this ruling, although given by a Full Bench ought not to be taken as authoritative, because at the time when it was pronounced a different practice prevailed in the Court, as to the dating of decrees (see this case explained in 39 Cal 766 at pp 769 772), this case has therefore been distinguished in all the cases cited above In *Ram Asray v Sheo Nandan*, 1 P L J 573 a Full Bench of the Patna High Court blindly followed the ruling of 13 Cal 104, but it should be noted that this Patna case has been likewise distinguished in two subsequent cases of the same High Court *Jyotindra Nath v Lodna Colliery Co Ltd*, 6 P L J 350 and *Syed Mahomed Moinuddin v Mahomed Ishaq*, 75 Ind Cas. 265 A I R 1913 Pat 529

Where the judgment was pronounced on the 18th December and decree signed on the same day but the bill of costs was not signed till the 18th January, and the appellant had applied for a copy on the 14th January which was furnished on the 24th January held that the period which should be deducted under sec 12 is the period from 14th January to 24th January, but not the period between the 18th December and the 18th January, during which the bill of costs remained unsigned The decree in this case was signed on the 18th December, before the application for a copy was made and it was only the bill of costs which remained unsigned at the time of application The non signature of the bill of costs had no effect at all upon the appellant—*Yamaji v Antaji*, 23 Bom 442

128 Delay in preparation of decree —If a party has not applied in time for copies of judgment and decree he will not be excused on the ground that the decree was not in existence at the date of his application, for the decree relates back to the date of judgment and he must make application for a copy of the decree in reference to that date, and if he does not do so he will not be entitled to any allowance for delay in preparing the decree—*Lakhoomal v Joomroomal*, 1 S L R 71

Where the intending appellant having applied for certified copies of the judgment and decree the copy of the judgment was delivered to him and at the same time an unused folio and the Court fee filed for the copy of

the decree were also returned because the decree had not been signed and the applicant had to make a fresh application for a copy of the decree after it had been signed *held* that the first application for a copy of the decree should be treated as pending all the time, so that the applicant would be entitled to the deduction of the time between the signing of the decree and the date when the copy of the decree was ready for delivery—*Tarabali v Lala Jagdeo* 15 C W N 787

Where some time is taken in getting the decree drafted because the extra Court fee is not paid and time is given for its payment such time must be deducted provided that an application for copy was made before the preparation of the decree—*Narajanaswamy v Krishnaswamy* 25 Ind Cas 67

129 Closing of Court —Where the Court was closed for vacation on and from the day following that on which the judgment was pronounced and the appellant applied for a copy of the judgment on the next re opening day *held* that in the circumstances of the case the time during which the Court was closed should be excluded as it must be taken to be a part of the time requisite for obtaining a copy of the judgment—*Saminatha v Venkatasubba* 27 Mad 21 *Sri Chandan v Haroo Sheikh* 13 C L J 544 11 Ind Cas 387 *Abdul Ghaffar v Rasulunnissa* 25 O C 71 68 Ind Cas 250 A I R 1912 Oudh 39 Judgment was pronounced on the 27th September and the decree prepared and signed on the same date The annual vacation began on the following day and the Court re opened on the 1st November The appellant applied for copy of judgment on the 3rd November and for copy of decree on the 13th and obtained both of them on the 21st and filed his appeal in the Lower Appellate Court on the 28th November It was held that since the day on which the judgment was pronounced must be deducted under sub section (2) and since the appellant could not have applied for copies during the vacation which immediately followed the date of judgment the whole of the time from the delivery of judgment to the re opening of the Court was part of the time requisite for obtaining copies of judgment and decree and this must be so whether the appellant applied for copies on the very day on which the Court re opened or on some later date In fact the date on which the application for copies was made has no bearing on the question whether or not the period of the vacation should be deducted—*Debi Charan v Mehdi Hussain* 1 P L J 485 (490) 20 C W N 1303 35 Ind Cas 888 following *Saminatha v Venkatasubba* 27 Mad 21 It seems that the learned Judge in the Patna case went too far in applying the ruling of the Madras case In the Madras case the application for a copy was made the very day on which the Court re opened so that the vacation and the time required for copy were continuous whereas in the Patna case the application was made two days later Therefore the remark that the date on which the application for copy was made has no bearing on the

question whether or not the period of vacation should be deducted cannot be supported. Moreover there is another point which was overlooked in the case viz that the application for copy was made at a time when the right of appeal did not subsist it subsisted only up to the 1st November (the day of re opening of the Court) the period of limitation having expired during the vacation.

That the decision of the above Patna case is incorrect is evident from another case of the Madras High Court based on the same facts where it has been held that if the judgment was delivered on the last court day before the vacation and the appellant applied for copy several days after the re opening of the Court the days during which the Court was closed could not be deducted—*Subramanyam v Narasimham* 43 Mad 644 38 M L J 465 56 Ind Cas 67

Where a judgment is delivered on the day preceding the last working day before the Court's vacation for a month and an application for a copy is made on the very day on which the Court re opens after the vacation the appellant is entitled to the indulgence of having his application for copy being accepted as equivalent to an application made a month earlier. He acts with due diligence and is entitled to have the time extended under the provisions of section 5. The principle is that it is unreasonable to cut down to 24 hours the time for a party to read and consider a judgment delivered against him to come to a decision whether he would or would not appeal and file an application for copies of the judgment and decree. If the law is strictly applied the appellant would have to make his decision all in one day. But it is unreasonable to expect him to get so much down in the time—*Sripat v Hubdar* 2 O W N 678 A I R 1925 Oudh 643 90 Ind Cas 115

130 Application for copy must be made while right of appeal subsists.—If the period for the presentation of an appeal expires on a day on which the Court is closed and if the appellant applies for copies of the decree and judgment on the date of the re opening of the Court whilst his right of appeal is still alive he is entitled to the benefit of this section and if his appeal be presented on the day he gets the copies (or even on the next day) it is not barred by limitation—*Siyadat un nissa v Muhanmad* 19 All. 342 *Pandharinath v Sankar* 25 Bom 586 *Tukaram v Pandurang* 25 Bom 584 *Sitaram v Ramji* 2 Bom L R 221 *Saminatha v Venkatasubba* 27 Mad 21 *Kashibai v Kannoo* 11 N L R 104 29 Ind Cas 833, *Megh Baran v Rama Das* 89 Ind Cas 956 A I R 1926 All. 111

But if the right of appeal did not subsist on the date on which the application for copies was made i.e. if the application for copies was made after the expiry of the period of limitation no deduction of time would be allowed—*Venkataji Row v Venkatchela* 28 Mad 452 *New Piecegoods Bazar Co v Jivabhai* 15 Bom L R 681, 20 Ind Cas 537 *Ashi v Ali*

Buksh 1911 P W R 189 *Guran v Bindrahan* 79 P R 1916 *Nidaran Chandra v Martin and Co* 37 C L J 127 58 Ind Cas 408 An appellant who has not within the period of limitation applied for a copy of the order appealed from and who has within that period taken no steps whatever towards procuring such copy cannot be allowed after the period of limitation has run out to claim exclusion of time requisite for procuring such copy—*Pramatha v Lee* 23 C W N 553 affirmed on appeal to the Privy Council in 49 Cal 999 27 C W N 159 68 Ind Cas 900 A I R 1922 P C 35

If the judgment was delivered nearly 3 months before the closing of the District Court for vacation and the application for copy was made on the re-opening day when the right of appeal did not subsist the appellant was not entitled to a deduction of the holidays because he could have made the application before the Court closed—*Venkata Row v Venkata Chela* 28 Mad 452 *Sundaram v Andi* 1911 M W N 364

131 Copy taken by another party —This section does not require that the application for copy must be made by the party himself—*Rudra v Raghuraj* 23 Ind Cas 709

When it appeared that the appellant applied within the prescribed period for a copy of the decree appealed from but allowed the application to be dismissed for non payment of the copying charges and subsequently filed the appeal together with a copy of the decree which had been obtained by a *10th r party* it was held that the appellant was entitled to a deduction of the time taken in obtaining this latter copy. There are no grounds for importing into the section the restriction that the copy of the decree must have been obtained on the application of the appellant himself—*Aminuddin v Pyari* 43 Mad 633 38 M L J 340 56 Ind Cas 73 (dissenting from *Ramamurthi v Subramania* 12 M L J 385) The language of section 12 is very general. It does not say by whom the copy is to be obtained. The time requisite for obtaining copies of decree and judgment should be excluded from computation of the period of limitation and it is not necessary that the application for the copies should be made by the appellant or some duly authorised agent nor is it necessary to show for what purpose the copies were obtained—*Ram Kishan v Kashi Bai* 29 All 264 In this case the copy had been applied for by the clerk of the appellant's Vakil in his own name

132 Criminal Appeal —In computing the period of limitation prescribed for a criminal appeal the time taken in forwarding an application by the prisoner for a copy of the judgment and in transmitting the same from the Court to the jail must be excluded—*Empress v Lingaya* 9 Mad 258

But the time spent in obtaining a copy of the diary orders in the case which were filed with the appeal, should not be excluded. There is no provision of law in the Cr P Code nor any rule of the Court requiring to

deduct this period—*U Zagriya v. Emp*, 3 Rang 220, 4 Bur L. J 44, 89 Ind Cas 459

132A. Miscellaneous appeal —Where a formal decree has been drawn up in a miscellaneous case under sec 47 C P Code, the time requisite for obtaining a copy of such a decree, which embodies the complete adjudication in the case, is to be deducted under sec 12, Limitation Act—*Mahesh Kanta v Chowdhury Ram Prasad*, 1 P L T 33, 54 Ind Cas 630

The plaintiff after having obtained a decree, applied under sec 476 Cr P Code to prosecute the defendant for having made certain false statements in his written statement. The Munsif rejected the application on 21st May 1924, and an appeal was filed in the Sessions Court under sec 476B after more than 30 days allowed by Art 154 of the Limitation Act. But the application of the plaintiff was treated as a separate miscellaneous civil case and a copy of the formal order was drawn up embodying the result of the judgment passed in the case, and the plaintiff had applied and obtained a copy of the formal order, according to the rules of the Court, before appealing to the sessions Court. Held that the time taken for obtaining the copy of the formal order should be deducted under sec 12 of the Limitation Act, and the appeal was within time—*Daulat v Kanhaiya*, 47 All 462 23 A L J 297, A I R 1925 All 119 87 Ind Cas 417

133 Application for leave to appeal to Privy Council —Section 12 of the Act of 1877 was restricted to an application for leave to appeal as a pauper and did not apply to an application for leave to appeal to His Majesty in Council, see *Anderson v Periasami*, 15 Mad 169 *Moroba v Ghanasham*, 19 Bom 301, *Shib Singh v Gandharb Singh*, 28 All 391. But the general language of section 12 of the present Act does cover such an application, and the time requisite for obtaining a copy of the decree of the High Court will be excluded from computation under subsection (2)—*Ram Sarup v Jaswant* 38 All 82, 13 A L J 1114, 31 Ind Cas 906 *Abdulla v Administrator General*, 42 Cal 35 18 C W N 1066 *Eastern Mortgage and Agency Co v Purna*, 39 Cal 510, 15 Ind Cas 497

The time spent in obtaining a copy of the judgment also will be excluded under sub section (3), because it is generally necessary that the judgment on which the decree of the High Court is based should be obtained in order that the parties may satisfy themselves by reference to it exactly what its terms are, and further because the rules of the High Court require a copy of the judgment to be filed with the application for leave to appeal to the Privy Council—*Mahabir Prasad v Jamuna Singh*, 1 Pat 429, 3 P. L T. 289, A. I R 1922 Pat 255, 68 Ind Cas 88. Although subsection (3) does not in terms apply to an application for leave to appeal, still the words 'when a decree is appealed from' may be interpreted to mean "when a decree is sought to be appealed from," and then the words would apply to an application for leave to appeal to the Privy Council, the time requisite for obtaining a copy of the judgment may therefore be excluded—

In re Collector of Chingleput 48 Mad 939, 49 M L J 418, 90 Ind Cas. 601, A I R 1925 Mad 1241. But the Allahabad High Court and the Sind Court have laid down that since subsection (3) does not expressly speak of an application for leave to appeal but only of appeal and review of judgment the time spent in obtaining a copy of the judgment cannot be deducted in an application for leave to appeal to the Privy Council—*Wilayah v Jhanda Wal* 24 A L J 349 A I R 1926 All 286, *Nur Mahomed v Hassomal* A I R 1925 Sind 60 78 Ind Cas 953. Moreover there is no practice in these Courts to require a copy of the judgment in such a case.

134 Time spent in taking unnecessary copies.—In computing the period of limitation prescribed for an appeal under clause 10 of the Letters Patent from the decision of a single Judge the time requisite for obtaining a copy of the judgment appealed from cannot be deducted such copy not being required under the rules of the Court to be presented with the memorandum of the appeal—*Fazl Muhammad v Phul Kuar*, 2 All 192, *Deokhtal v Ranand Lal* 5 P L J 701. It is doubtful however, whether these cases can now stand as good law, in view of the amendment of sec 29, which now makes section 12 applicable to special and local laws, and the Letters Patent is undoubtedly classed under special laws.

In a second appeal, the time requisite for obtaining a copy of the *decree* of the Court of first instance cannot be deducted, such copy not being required to be filed along with the memorandum of second appeal—*Pirathis v Venkataramanayyan* 4 Mad 419. So also, the time occupied in obtaining a copy of the *judgment* of the Court of first instance will not be deducted in computing the period of limitation for a second appeal, because it is not a judgment on which the appellate decree is founded within the meaning of subsection (3), and a copy of it unnecessary, even though the High Court makes a rule under which the memorandum of second appeal is required to be accompanied by a copy of the judgment of the Court of first instance such a rule cannot have the effect of altering the period of limitation prescribed by this Act. Therefore inspite of the existence of such a rule the appellant before the High Court will not be entitled to deduct the period requisite for obtaining a copy of the first Court's judgment—*Narsingh Sahas v Sheo Prasad*, 40 All 1 (F B), *Madan Gopal v Malawa Ram*, 68 Ind Cas 777 (Lah), *Chuharmal v. Bira Ram*, 73 Ind Cas 919 (Lah). This is also the view of the Rangoon High Court but that High Court is also of opinion that in certain exceptional cases the Court may in its discretion excuse the delay caused in obtaining the judgment of the Court of first instance—*Maung Po Aung v U Bya*, 3 Rang 310, 90 Ind Cas 910, A I R 1925 Rang 344.

135 Application for review.—Although it is not necessary that an application for review of judgment should be accompanied by a copy of the decree, order or judgment sought to be reviewed, still time is allowed

for obtaining such copy in order that the person interested in applying for review of judgment might inform himself accurately by a perusal of the copy of the decree or order or judgment as to what its contents are so that he may not be compelled for fear of limitation to hurry into an application for review without having the full opportunity of considering the terms of the decree order or judgment—*Wajid Ali v Nawal* 17 All 213 (F B) at p 216 *Gangadhar v Shekharbhashini* 20 C W N 967 35 Ind Cas 348 *Chokalingam v Lakshmanan* 38 M L J 224 55 Ind Cas 444

135A Application to set aside award —In respect of an application to set aside an award the time taken for obtaining a copy of the award must be excluded from computation—*Sova Chand v Hurry Bux* 46 Cal 721 (727) *Ghulam Jilani v Mahammad Hasan* 12 M L J 77

136 Appeal under special or local laws —Under sub section (2) (a) of section 29 as now amended the provisions of this section shall apply for the purpose of determining any period of limitation prescribed by any special or local law The following decisions are therefore no longer good law —*Wall v Howard* 18 All 215 *Kumara v Sithala* 20 Mad 476 *Bhagwan v Collector* 79 P R 1904 *Abu Backer v Secretary of State* 34 Mad 505 (T B) *Jugal Kishore v Gur Narain* 33 All 738 *Duraisami v Meenakshi* 16 M L T 246 *Sivaramayya v Bhujanga* 39 Mad 593 *Lingayya v Chinna Narayana* 41 Mad 169 (F B) The ruling in *Dro pods v Hira* 34 All 490 (F B) will now stand as correct

Under the present amendment therefore this section will apply to an application to the Collector to make a reference to the District Court under sec 18 of the Land Acquisition Act and the applicant will be allowed to deduct the period requisite for obtaining a copy of the Collector's award —*Burjorjee v Special Collector Rangoon* 5 Bur L J 26 A I R 1926 Rang 135

137 Interference by High Court —What time is or is not requisite for obtaining a copy of the judgment etc is a question of fact to be determined by the Appeal Court and whether that fact be decided rightly or wrongly the decision cannot be interfered with in second appeal—*Thana Mal v Nihali* 6 P R 1894 *Rani Sarup v Zorawar* 73 Ind Cas 447 (Lah) *Sher Singh v Prem Ray* 100 P R 1918 48 Ind Cas 31

13 In computing the period of limitation prescribed for

any suit, the time during which the defendant has been absent from British India and from the territories beyond British India under the administration of the Government shall be excluded

This section is based on the English law according to which if the de

defendant is beyond seas at the time of the right of action accruing to the plaintiff, the time or times appointed by the statute do not begin to run until the defendant returns from beyond seas. See *Banning on Limitation*, 3rd Edn., p. 65.

138 Scope.—This section applies only to defendants in favour of plaintiffs so as to prevent limitation from running against the latter, and only in respect of the institution of a suit: it is not applicable in favour of a defendant who has been absent from British India and wants to set aside proceedings in execution—*Ashan v Ganga* 3 All 185.

This section has reference only to the absence of the defendant from the realm, not to that of the plaintiff. A plaintiff out of the realm may prosecute a suit by his attorney, but when the defendant is out of the realm it is very hard to call upon the plaintiff to institute a suit which in most cases must be wholly without fruit—*Domun v Shubul Koolall* 10 W. R. 253.

The plaintiff's voluntary absence in a foreign country cannot bar the operation of limitation—*Venkatasubba v Girisammal*, 2 M. H. C. R. 113. And this section is equally inapplicable even if the plaintiff's absence may be involuntary through transportation—*Domun v Shubul*, 10 W. R. 253. In England also the disability of the plaintiff arising from absence beyond seas and the disability of imprisonment have been abolished by the Mercantile Law Amendment Act 1856 (19 & 20 Vic. C. 97), section 10.

139 Absent.—The word absent includes a person who had never been present in British India. Absence does not necessarily imply a previous presence—*Maharaja v Provincial Bank* 72 P. R. 1891. *Atul Krishna v Lyon* 14 Cal. 457. *Poorna v Sassoon* 25 Cal. 496. Even where the defendant pays occasional visits to British India this section will apply—*Janki v Manohar Lal* 26 P. R. 1897.

If the defendant actually returns to British India the plaintiff's ignorance of the fact of such return does not prevent the operation of limitation—*Mahomed Museehooddeen v Clarajene* 2 N. W. P. 173.

Strict proof of absence is necessary. Where a plaintiff says that the defendant was out of British India for a certain period and that he is entitled to deduct this period, all this should be specifically pleaded and the plaintiff would be required strictly to prove the duration of the period of the defendant's absence—*Periyanna v Arasu*, 9 M. L. T. 217, 9 Ind. Cas. 568.

140 Defendant represented by agent.—It was held in *Harrington v. Ganesh Roy*, 10 Cal. 440, that this section did not apply when the defendant, though not residing in British India, was to the knowledge of the plaintiff represented by a duly constituted agent and mookhtar. But that decision was doubted in *Atul Krishna v Lyon*, 14 Cal. 457 and afterwards overruled by the Full Bench in *Poorna Chunder v Sassoon*, 25 Cal. 496 in which it has been held that this section applies even where to the knowledge of the plaintiffs, the defendants (partners in a firm) are

the period of their absence carrying on business in British India through an agent, who is empowered to institute and defend suits

141 Several defendants—Absence of one —Under the English law where there are several defendants and one of them is beyond seas at the time of the right of action accruing to the plaintiff the time does not begin to run against the absent defendant until he returns but as against the defendants who are not beyond seas at the time of the right of action accruing to the plaintiff the time begins to run equally as if they were the persons solely liable to be sued as defendants See Banning on Limitation 3rd Edition p 66 In India also in a suit against partners where one of the partners is absent from India it has been held that the fact of his absence does not entitle the plaintiff to deduct the time against *all* the defendants but against the particular absentee defendant only but the fact that he has allowed the suit to be barred against the other partners who are present in India during the absence of the absentee is not a ground for holding that the claim against the absentee is also barred by limitation—*Palaniappa v Veerappa* 41 Mad 446 34 M L J 41 44 Ind Cas 466

142 Absence after accrual of cause of action —It was held in *Narrosji v Musuram* 6 Bom 103 that this section must be read subject to section 9 that the absence of the defendant from British India was to be regarded as the plaintiff's inability to sue within the meaning of sec 9 and therefore if the defendant's absence took place *after* the accrual of the cause of action the period of limitation would not be suspended during such absence but would run continuously according to the provisions of that section But it has been pointed out in subsequent cases that the inability referred to in sec 9 must be a personal inability affecting the *plaintiff* himself and having reference to *his* condition state or position and not to the circumstances of the *defendant* consequently the absence of the defendant is not an inability within the meaning of sec 9 and therefore that section would not apply to the case but the period of limitation would be suspended during the defendant's absence Section 9 should not control sec 13 and the period of defendant's absence would be deducted from computation no matter whether such absence took place before or after the accrual of the cause of action—*Hanmantram v Bowles* 8 Bom 561 *Beake v Davis* 4 All 530 *Janki v Manoharlal* 26 P R 1897 In all these cases the Judges have dissented from 6 Bom 103 In another Bombay case also it has been held that the absence of the defendant from British India does not amount to an inability to sue within the meaning of sec 9 —*Jivraj v Babaji* 29 Bom 68 (70)

143 Territory under administration of Government —A place outside British India (e.g. Basra) which is merely in military occupation by an army despatched by the Government of India is not a territory under the administration of the Government of India within the meaning

of this section, but is a foreign territory under military occupation, the object of which is much more restricted than that of an administration. Therefore the period during which the defendant was staying in Basra should be excluded under this section as the defendant was 'absent from British India and from the territories outside British India under the administration of the Government'—*Iakhrullah v Ramsarup*, 45 All 18, 20 A L J 756 68 Ind Cas 978, A I R 1923 All 64

14 (1) In computing the period of limitation prescribed

Exclusion of time of proceeding bona fide in court without jurisdiction

for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court

of appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it

(2) In computing the period of limitation prescribed for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court of appeal, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it

Explanation I—In excluding the time during which a former suit or application was pending, the day on which that suit or application was instituted or made, and the day on which the proceedings therein ended, shall both be counted.

Explanation II.—For the purposes of this section, a plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding.

Explanation III.—For the purposes of this section, misjoinder of parties or of causes of action shall be deemed to be a cause of like nature with defect of jurisdiction

144 Scope—This section is not applicable for the purpose of computation of time for appeals—*Aidh v Matangini*, 23 Cal 323, *Bani v Berhamdeo*, 19 C W N 473 But its reasonable principle may be

and the circumstances contemplated in this section may and ordinarily would constitute a sufficient cause within the meaning of section 5 for not presenting an appeal in time—*Balwant v Gumoni*, 5 All 591, *Ramjiwan v Chandmal*, 10 All 587 (596), *Karim Baksh v Daulat Ram*, 183 P R 1888 *Kumudini v Kamalakant* 35 C L J 106 Thus, the *bona fide* prosecution of a proceeding in a wrong Court has been regarded as a proper ground or a 'sufficient cause' within the meaning of section 5 for extending the time for filing the appeal—*Upa. Thakura v Kumud-nath*, 22 C W N 594 So also, on the analog, of section 14, the time spent in a suit wrongly filed for getting an order set aside might properly be deducted in computing the period of limitation for subsequently filing an appeal from such order—*Sitaram v Nimba*, 12 Bom 320 See Notes 50 and 51 under sec 5

In two recent Allahabad cases (*Gadre v Brynnandan*, 21 A L J 205, 45 All 332 and *Ram Raj v Umraji*, 93 Ind Cas 292, A I R 1926 All 345) it has been held (without any reason being assigned for it) that this section does not apply to applications This decision is incorrect, as sub section (2) does apply to applications

145. Plaintiff —A plaintiff can claim the benefit of this section only where the previous proceedings had been brought by himself or by some person through whom he derives title to sue—*Barodakant v Soohmoy*, 1 W R 29 If the former proceedings had been instituted by a wrong plaintiff, no deduction can be made Thus, where the manager of the plaintiff brought a suit in his own name for the value of trees cut down by the defendant on the plaintiff's ground and the suit was dismissed as he had no cause of action, the plaintiff himself in bringing a subsequent suit could not deduct the time occupied in the previous suit—*Rajendra v Bulahy* 7 Cal 367 Where the plaintiff and another person had brought the previous suit in one capacity, and the plaintiff alone brought the present suit in another capacity, no deduction of time spent in the previous suit can be made—*Hossein v Asha Bibi*, 1 Rang 402, A I R 1924 Rang 123 (see this case fully cited in Note 150 below) Where the plaintiff in the second suit was not prosecuting the first suit and was not associated with the plaintiffs of the first suit, no deduction of time can be made—*Niranka v Atul Krishna*, 28 C W. N 1009, A I R 1925 Cal 67.

146. Prosecuting a proceeding —It is not necessary that the plaintiff must have been prosecuting the previous proceeding as a plaintiff He is entitled to a deduction of the period of pendency of a former suit in which he as defendant was urging the same claim as he afterwards prefers as plaintiff—*Jugulender v Din Dayal*, 1 W R 310 Similarly, the plaintiff is entitled to deduct the period during which he as respondent has been opposing a previous appeal brought against him by the present defendant—*Lakhan Chander v Madhusudan*, 35 Cal. 209 (See Explanation 2) So also, a plaintiff who in a previous proceeding had been

opposing an application for insolvency will be said to have been prosecuting a proceeding, and the time spent in such proceeding will be excluded—12 Bur L T 83 The decreeholder making an application for execution is entitled to deduct the time occupied by him in resisting a previous suit brought by the judgment-debtor for stay of execution of the decree—*Naralchand v Anichand* 18 Bom 734 But in a recent Bombay case it has been held that merely defending a suit does not amount to prosecuting a proceeding Explanation 2 speaks of resisting an *appeal* and does not speak of resisting a *suit*—*Som Sekhar v Shuappa*, 25 Bom L R 863, A I R 1924 Bom 39 The Lahore High Court held on an application to file an award beyond the period of limitation prescribed by Article 178, that under the circumstances of the case the applicant would not be entitled to deduct the time spent by him as *defendant* in setting up the award in bar of a prior suit instituted by the plaintiff—*Nazim Khan v Alam Khan*, 89 P R 1919

147 Another civil proceeding —It includes a proceeding by way of appeal or revision Thus, in a suit to set aside an order, the plaintiff is entitled to a deduction of the time during which he had been prosecuting an appeal or revision against the order—*Seth Mulchand v Seth Samir*, 1882 A W N 59 A revision to the High Court is a civil proceeding in a Court of appeal within the meaning of this section—*Venkatarangayya v Marala* 17 Ind Cas 539 The period spent in prosecuting a suit in a wrong Court and an appeal from the decision therein should be excluded in computing the period of limitation for a subsequent suit brought in the proper Court—*Hari Prasad v Sourendra Mohan* 1 Pat 506, *Raj Krishna v Beer Chunder* 6 W R 308

In order to decide whether a proceeding should properly be termed a civil proceeding in a Court it is necessary in each case to examine the precise nature of the proceeding and the constitution of the authority before whom such proceeding is taken—*Laxman v Keshav*, 43 Bom, 201, 20 Bom L R 918

A proceeding before a settlement officer for mutation of names in the revenue records is not a *civil* proceeding in a Court within the meaning of this section—*Muhammad Subhanullah v Secretary of State*, 26 All 382. Even if the proceeding be considered to be a civil proceeding, still as it was not before a *Court* but before a purely *executive officer*, it did not fall under this section—*Ibid* A *civil* proceeding before a *Revenue Court* (as distinguished from a *Revenue officer*) falls under this section Thus, where a suit was brought in the Revenue Court for arrears of rent but it was dismissed as the case did not fall under the Bengal Act VIII of 1869 held that in a subsequent suit in the civil Court on the same cause of action the plaintiff was entitled to deduct the time occupied by the suit in the Revenue Court—*Govinda v Manson*, 15 B L R 56 See also *Yusuf Ali v Abbas Ali*, 26 P L R 27, 84 Ind Cas 733 But see *Govinda*

v *Santa* 83 P R 1914 26 Ind Cas 441 So also where the plaintiff tried to get an invalid certificate granted under section 8 of the Bengal Act VII of 1880 set aside by the Revenue Court, which however had no jurisdiction to grant him relief it was held that the time spent in the Revenue Court should be deducted in computing the time for a subsequent suit—*Girijanath v Ram Narain* 20 Cal 264 following *Ram Logan v Bhawan* 14 Cal 9 An application under sec 28 29 or 42 of the Bengal Land Registration Act is not a civil proceeding and the Land Registration Collector is not a Court—*Ramjee v Rai Bishen Dutt* 7 P L T 61 90 Ind Cas 244 A I R 1926 Pat 194

An application to a Collector to take action under Sec 11A of the Bombay Hereditary Offices Act is not a civil proceeding in a Court and the time taken up in such proceeding cannot be excluded under this section—*Laxman Ganesh v Keshav Govind* 43 Bom 201 20 Bom L R 918 48 Ind Cas 467

Proceeding before Conciliator —The money due on a bond became payable on 31st May 1910 the plaintiff applied to the Conciliator for a certificate on the 28th March 1913 but before he could obtain it Government abolished the conciliation system with effect from 30th May 1913 The plaintiff filed the suit on the 30th June 1913 and claimed to exclude the time between 28th March and 30th May 1913 from the period of limitation It was held that though the plaintiff was not entitled to deduct the time claimed he was entitled to a reasonable extension of time on the principle that where the law creates a limitation and the party is disabled to conform to that limitation without any default on his part and he has no remedy over the law will or humanly excuse him—*Satyabhamabai v Govind* 38 Bom 653 16 Bom L R 447 25 Ind Cas 66 But where the conciliation system was abolished after the plaintiff obtained the certificate and before the institution of the suit the plaintiff was entitled to deduct the period between his application to the conciliator and the grant of the certificate—*Rupchand v Mukunda* 38 Bom 656 25 Ind Cas 67

148 Court —The Court only refers to a Court in British India and does not include a Foreign Court, such as a Court in a Native State The time spent in proceedings before such a Court cannot be deducted—*Chanmalappa v Abdul Wahab*, 35 Bom 139 12 Bom L R 977, 8 Ind Cas 645 *Parry v Appasami* 2 Mad 407 *Rajanna v Narayan* A I R 1923 Nag 321

The settlement officer the Commissioner and the Board of Revenue are not Courts but executive officers of Government—*Muhammad Subhanullah v Secretary of State* 26 All 382

Under the rules framed by the Bombay High Court the Collector is not a Court for the purpose of setting aside a sale under section 311 C P Code (188) and the period during which proceedings were pending before him cannot be deducted—*Narayan v Rasul Khan* 23 Bom 531 *Tipan*

guda v Ramaguda 44 Bom 50 (54) 22 Bom L R 35, 54 Ind Cas 670

A Collector acting under sections 10 11 11B of the Deccan Agriculturists' Relief Act is acting purely as an administrative officer and not as a Court—*Pravin Ganesh v Keshav Gound* 43 Bom 201 (205)

A Collector appointed under the Deccan Agriculturists' Relief Act, XVII of 1879 is not a Court. The time occupied by proceedings before him cannot be excluded in computing the time for proceedings in the regular Court—*Manohar v Gebrapa* 6 Bom 31

In C P the Deputy Commissioner is not invested with power to dispose of objections under O 21 r 53, C P Code or to dispose of applications under O 21 r 100. He is not a Court in connection with those objections and applications and the time spent in proceedings taken before him cannot be deducted—*Bandappa v Shankar*, A I R 1924 Nag 309

149. Against the defendant'—The defendant must be the same in both the proceedings. This section excludes the time taken in proceeding *bona fide* in Court without jurisdiction against the particular defendant—*Ram Pher v Ajudhta* 12 O L J 66, A I R 1925 Oudh 369. Where there are several defendants in the second suit, and the former suit was instituted against only one of them no exclusion of time will be allowed—*Nilmadhub v Krishnadoss* 5 W R 281. But where the first suit was brought against two defendants and the second against only one of them, the case may come under this section. Thus where the plaintiff as payee of an order drawn by the defendant at Ahmedabad where he resided, which was dishonoured on presentation by the drawee filed a suit in Surat against the drawer and drawee (who resided in Surat and against whom the plaintiff had no cause of action) and permission having been refused by the High Court to try the case against the drawer at Surat, the plaintiff withdrew the plaint and filed a suit against the drawer alone at Ahmedabad, it was held that he was entitled to deduct the time occupied by the former suit—*Seth Kahandas v Daktabhai*, 3 Bom 182

The plaintiff who had purchased a patni at a sale under the Patni Regulation in 1908 and had paid rent to the Zeminder in 1910, instituted a suit in 1916 against the Zeminder, after the patni sale was set aside in 1912, for recovery of the amount paid as rent, and claimed to deduct the period which was occupied by a proceeding for assessment of mesne profits as between himself and the original patnidar on the basis of the decree for cancellation of the sale. Held that the plaintiff was not entitled to a deduction of the period, because the proceedings for assessment of mesne profits were between himself and the original patnidar, whereas the present suit was between himself and the Zeminder—*Janaki Nath v Bijoy Chand Mahalab*, 26 C W N 271, 60 Ind Cas 698

Where a plaintiff brings two suits against two different branches of the same family to recover a share of the property in the possession of

each and the suits are dismissed as improperly framed he cannot be allowed any deduction for the time occupied in these suits when he subsequently brings a consolidated suit against both branches of the family—*Jotaram v Bai Ganga* 8 B H C R 228

No deduction will be allowed for time spent in litigating against a wrong party—*Munna Jhunna v Lahjee* 1 W R 121 *Kawasjee v Burjorjee* 10 B H C R 224

Where the previous suit was brought against a certain person and the second suit was brought against another who derived his liability to be sued from the defendant in the first suit a deduction of time will be allowed because the defendants in both suits are virtually the same according to the definition in section 2 (4)—*Hari Prasad v Sourendra*, 1 Pat 506 (521) 3 P L T 709 A I R 1922 Pat 450

150 Same cause of action —The essential point to be considered is that the previous proceeding was founded upon the same cause of action which is the foundation of the subsequent suit—*Dund v Deo Nandan* 17 C L J 596 20 Ind Cas 513 Where the first suit and the second were not substantially based on the same cause of action this section would not apply—*Manghu v Kandhat* 8 All 475 Thus where a suit was originally brought by the landlord in the Revenue Court to eject the defendants as tenants a subsequent suit by him in the Civil Court treating the defendants as trespassers would not be saved from limitation by the operation of this section because the cause of action in both the suits is not the same—*Dondoo v Sheo Narain* 36 Ind Cas 770 (Oudh) A partnership existed between H M and B After the death of B in 1913 his wife A and his son C sued in 1914 as administratrix and administrator for dissolution of partnership and for accounts The allegations of the two plaintiffs were that the partnership had not been determined by the death of B as the two other partners took C into the partnership in his father's place The Court held in 1917 that the partnership had terminated on the death of B and directed that accounts should be taken the claim to an account for a longer period was therefore dismissed Meanwhile C had died in 1916 Then A brought the present suit as administratrix to the estate of her son and asked for a declaration that C was entitled to the same share in the business as his father had from the date of the father's death in 1913 up to 29th March 1916 when C died This suit was instituted in December 1919 but the plaintiff claimed that she was entitled to a deduction of the time during which the previous suit was pending because limitation was suspended while that litigation was taking place Held that the present suit was barred and that plaintiff was not entitled to a deduction of the period because the prior suit was in a different capacity and on a different cause of action The parties to the first suit were not the same parties as those in the second suit the cause of action in the first case was the claim to one estate and the cause of action in the second case

was the claim to another estate and the proceedings in the first suit were not infructuous on the ground of defect of jurisdiction or any other cause of like nature—*Hossain v Isha Bibi* 1 Rang 402 6 Ind Cas 639 A I R 1924 Rang 123

A plaintiff who wrongly sues a tenant in ejectment and loses his case cannot have the benefit of the time spent in that suit when he afterwards sues for rent which accrued due while the first suit was pending—*Hurro Pershad v Gopal Chunder* 9 Cal 255 (P C). So also a proceeding under sec 46 of the Bengal Tenancy Act for assessment of fair and equitable rent is not a suit based on the same cause of action as a suit for recovery of rent at the old rate from the raiyat—*Port Canning Co v Achiruddi* 43 C L J 45 92 Ind Cas 37 A I R 19 6 Cal 693 But where the plaintiff sued for land and mesne profits and the claim for mesne profits was dismissed on the ground that a separate suit should be brought on it held in a second suit brought for the mesne profits that the plaintiff would get a deduction of the time occupied in the first suit as the cause of action in the two suits was the same—*Hurro Chunder v Shoorodhoney* 9 W R 402 (F B)

Where the obligation sued upon previously was a several one and in the second suit it is joint the two suits cannot be said to be based upon the same cause of action—*Morris v Chinnaasawmy* 7 M H C R 242

A plaintiff cannot be said to sue on the same cause of action when he brings a suit for possession of a land first under a proprietary right and failing on that under a mere leasehold right—*Parahut v Edapally* 2 M H C R 266

The plaintiff had originally applied to the Court to enforce an award. The Court holding that the award was too inadequate to be capable of execution remitted the award to the arbitrators for reconsideration and they amended it accordingly subsequently the plaintiff brought a regular suit on the amended award. The District Judge rejected the suit as barred by limitation. Held that the plaintiff was entitled to a deduction of time under sec 14. The cause of action must be held to be the same in the previous and subsequent suits as in both cases the ground on which the plaintiff came into Court was the alleged settlement of the disputes between him and the defendants by an award made by the arbitrators who were the same in both cases and the substantive award was the same in both—*Nadar Mal v Shankar Das* 67 P R 1889

Where a decree holder who had attached in 1913 a book debt due in 1911 to his judgment debtor sold it in auction and purchased it himself in February 1915 and sued in March 1915 to recover it from the defendant who pleaded the bar of limitation held that the suit was barred. The time of pendency of the attachment proceedings would not be deducted under this section as those proceedings were not based on the same cause of action as the suit to recover the debt—*Rangaswamy v Thangavelu*, 42 Mad 637

The time occupied by a trustee *de son tort* in defending a suit brought by the lawful trustee for the recovery of the trust estate cannot be deducted in favour of the trustee *de son tort* in a subsequent suit brought by him for the recovery of the out-of-pocket expenses incurred by him for the management of the trust estate, because the causes of action in the two suits are not the same the trustee *de son tort* having made no counter-claim as regards those moneys in the previous suit—*Abkan Sahib v Soran Bibi*, 38 Mad 260

A proceeding in a Revenue Court for mutation of names and an application for filing an award of arbitrators in respect of title of the parties are two different proceedings founded on separate causes of action, and the time spent in the former proceeding cannot be excluded in computing the period of limitation for the latter proceeding—*Ram Ugrah v Achray Nath* 38 All 85 (91)

151 Good faith and due diligence —It has been held in *Ranjitwan v. Chand Mal*, 10 All 587 (598) that this section contemplates only those cases where the party had been misled into litigating in a wrong Court through *bona fide* mistake of fact as distinguished from ignorance of law. But in a later Full Bench case of the same High Court (*Brij Mohun v Mannu* 19 All 348) it has been laid down that a *bona fide* mistake of law may be a sufficient foundation for the grant of indulgence under this section. The Patna High Court holds that proceedings coming under section 14 must be such as are recognised by law as legal in their initiation, though a party has carried the proceedings to the wrong Court. But a party who is proceeding in ignorance of law cannot be said to proceed with due diligence or in good faith. Thus, where the first proceeding was one which was not recognised by law, no deduction of time spent on such proceeding can be made—*Sheo Dhar v Guptaeswar*, 78 Ind Cas 482, A I R 1924 Pat 716

Ignorance of law or the ill advice of a pleader does not necessarily or *prima facie* establish a want of good faith. Therefore where a plaintiff instituted a suit in a wrong Court engaged a pleader and took the usual steps which a litigant is compelled to adopt, it was held that although it was a stupid though not unaccountable blunder, still as it was made *bona fide* the plaintiff was entitled to deduct the time under this section—*Ram Raju v Pralhaddas*, 20 Bom 133. But the fact that a litigant acted on the advice of a pleader will not entitle him to get the benefit of the provisions of this section, if the error made is so patent that it could have been avoided with the exercise of due care—*Ram Sahu v Imdad*, 22 O C 39, 51 Ind Cas 590. A litigant who takes action without going to the trouble and expense of taking legal advice cannot be said to have exercised due diligence and must take the consequences if he makes mistake. A litigant who consults a legal practitioner of inferior standing and little experience is in no better position. But when the advice is that of a

pleader of the Bar and is given after due deliberation and is followed, the Court cannot simply because the advice was utterly wrong, hold that the litigant has not exercised due care and diligence—*Fathur Ali v Sahib Nur* 254 P L R 1913 20 Ind Cas 3

Where the law gives no jurisdiction to a Court or officer in a certain matter there can be no *bona fide* mistake as to its or his jurisdiction in relation to that matter and the time spent in a proceeding before such Court cannot be deducted. Thus under the rules of the Bombay Government a Collector executing a decree has no jurisdiction to set aside a sale made by him and a party who makes an application to him to set aside a sale cannot be allowed to deduct the time spent in so doing in computing the period of limitation for a subsequent application to the proper Civil Court—*Varayan v Rasulkhan* 23 Bom 531

A proceeding for execution of a decree taken erroneously but *bona fide* and with due diligence before a Court which had no jurisdiction but which the decree holder believed to have jurisdiction is a *bona fide* one within the meaning of this section and the time occupied in such proceeding will be deducted—*Jahar v Kamini*, 28 Cal 238 *Hiralal v Badridas*, 2 All 792 (P C) See also *Pandu v Jamna Das*, 26 Bom L R 470, A I R 1925 Bom 113, 85 Ind Cas 778

Where a plaint was returned by the Sub-Judge to be filed in the Munsif's Court on the ground that the suit had been overvalued, and there was nothing to show want of *bona fides* in the plaintiff, the time spent in the Sub Judge's Court was deducted—*Obhoy v Kritartha*, 7 Cal 284, *Brij Mohan v Mannu Bibi* 19 All 348 (F B) Similarly where a plaint was returned by the Court on the ground that the plaintiff had under valued his claim, and there was nothing to show that the under-valuation was deliberate, reckless or *mala fide* it was held that the time taken up in the wrong Court should be excluded—*Ramdayal v Saraju*, 17 O C 210, *Seshamma v. Shankar*, 12 Mad 1 *Rahatulla v Ibadulla*, 18 Ind Cas 92, *Bhawani v Industrial Bank* 1919 P W R 4 *Chandi v Jankiram*, 1 B L R S N. 12. Where a suit was rightly valued and was presented to the proper Court, but the Court mistakingly believing the suit to be undervalued returned the plaint, and then the plaintiff was driven from Court to Court for a period of 6 months, after which he could file his suit again in the right Court, held that he should be given the benefit of this section, as there was no want of good faith or diligence on his part, and he ought not to suffer owing to the mistake of the Court—*Raghubar, v Kanhaiya*, 12 O L J. 297, 2 O. W N 383, A I R 1925 Oudh 493

A claim cannot be said to be not *bona fide* when two Courts concur in decreeing the claim, although the final Court of appeal holds the decree to be erroneous. Therefore the time occupied in the previous suit in which that claim was preferred, from the date of institution of the suit up to the

date of the decree in second appeal, should be deducted—*Dinanath v Jadu Nath*, 29 C W N 202, A I R 1925 Cal 456

A certain document (Collector's certificate under sec 6 of the Pensions Act) which was necessary to give the Court jurisdiction in a case was not produced, and the defendant did not object to its absence until the case was almost finished the Court then threw off the case for want of the certificate In a subsequent suit brought by the plaintiff it was held that the non production of the document in the previous suit did not constitute such want of diligence on the plaintiff's part as to disentitle him to the deduction of time allowed by this section The case was one of error committed in good faith and not one of want of due diligence—*Putali Meheti v Tulja* 3 Bom 223

A suit was brought in the Presidency Court of Small Causes against defendants not resident within the local limits of its jurisdiction, with the leave of the Registrar of the Court, who exercised the powers of the Court Suddenly it was ruled by the High Court that the leave of the Registrar was not the leave of the Court The plaintiff's suit was thereupon rejected by the Small Cause Court Subsequently he instituted a fresh suit after obtaining the leave of the Court, and claimed to deduct the period occupied by the first suit It was held that he was so entitled The fact that he instituted the first suit with the leave of the Registrar instead of with the leave of the Court did not amount to any negligence or want of *bona fides* on his part because up till then the Registrar had been for many years exercising the powers of the Court to grant such leave under a Rule passed by the High Court The former suit was therefore prosecuted in good faith and with due diligence within the meaning of this section—*Subbaray v Yagana*, 19 Mad 90

A plaint was filed in the High Court with leave under clause 12 of the Charter such leave having been obtained from the Registrar Subsequently in another case it was decided that the leave of the Registrar was bad in law Thereupon the Court rejected the plaint and ordered it to be returned to the plaintiff who afterwards brought a fresh suit on the same cause of action Held that section 14 should be applied in calculating the period for the second suit—*Ramdeo v Gonesh* 35 Cal 924

In execution of a decree a sum in excess was realised from the defendant He filed a suit to recover back the amount but it was dismissed on the ground that no suit could lie, and the proper remedy was to file an application under section 47, C P Code Thereupon he made an application to obtain refund of the money recovered in excess Held that in computing the period of limitation for the application the time taken up in prosecuting the suit ought to be deducted, as the suit was brought with due diligence under a *bona fide* mistake—*Ganpatrao v Anandrao*, 44 Bom 97

When in proceedings in execution of a decree for rateable distribution payment was wrongly made to the defendant, and the plaintiff instead of

prosecuting a suit filed a revision petition in the High Court against the order of wrongful distribution *held* that the revision petition was not prosecuted in good faith because no revision petition could be while there was another remedy by way of suit and he was not entitled in a subsequent suit under section 3 () of the C P Code to deduct the time taken by the revision petition—*Bajmath v Ramadoss* 39 Mad 62

Where an appellant should have known that the High Court and not the District Court had jurisdiction to hear in appeal and yet persisted in appealing to the District Court *held* that there was no good faith on his part and therefore the Court refused to excuse the delay when he afterwards filed his appeal in the High Court—*Daudbhai v Gmubai* 28 Bom 235

The plaintiff filed a suit for damages for malicious prosecution against a Magistrate. The defendant pleaded want of notice under section 80 C P Code. The plaintiff went to trial on this issue and his suit was dismissed. Thereafter the plaintiff gave the required notice and again brought a suit and claimed to deduct the time spent in the previous suit. *Held* that in view of the well known and old standing procedure requiring previous notice and the clear words of section 80 C P Code the plaintiff could not be said to have acted in good faith in the previous suit and was therefore not entitled to exemption under this section—*Manghanmal v Fernandez*, 5 S L R 181

A plaintiff cannot be said to have prosecuted a suit with due diligence when owing to his own negligence or default the suit is so framed that the Court cannot try it as for instance where the plaintiff omitted to set out certain boundaries of the land in the plaint—*Chunder v Bissessuree* 6 W R 184 (F B) or where the plaintiff neglected to register a compulsory registrable certificate and to produce the same in Court—*Bai Jumna v Bai Ichha* 10 Bom 604

The plaintiff brought a suit in a wrong Court on 20.5.1913 and that Court ordered the return of the plaint to the proper Court. But the plaintiff refused to take it back and in 1914 filed a revision against the order to the High Court which was dismissed on March 16 1915. On June 15 1915 the plaintiff having applied for return of the plaint it was returned to him on June 30 and he filed it on the same day in the proper Court. *Held* that the plaintiff was not entitled to a deduction of the time between May 20 1913 and June 30 1915 in as much as he could not be deemed to have been prosecuting the case with due diligence in view of the fact that he waited for three months after the dismissal of the revision before he applied for the return of the plaint—*Hameda v Fatima* 16 A L J 429 45 Ind Cas 991

A plaint was rejected on the ground of limitation as the plaintiff omitted to set out certain payments of interest by the defendants which payments if so set out would have saved the suit from being barred by limitation

Thereupon the plaintiff brought a fresh suit setting out all those payments. It was held that the period during which the first suit was pending in the Court was not to be deducted in computing the period of limitation for the second suit, as the omission of the plaintiff to set out the facts of payment amounted to a want of due diligence on his part in conducting the first suit—*Nobin v Rajomoyi*, 11 Cal 264.

Where each of two plaintiffs came into Court originally to sue separately in respect of a contract which gave them a *joint* but not a *several* right, and this error was pointed out to them and they were given every opportunity of rectifying it but they elected to proceed with their suits as then framed, and by the time that those suits were dismissed, the period of limitation for a fresh suit had expired, it was held that in these circumstances the plaintiff did not exhibit that degree of diligence which would entitle them to the benefit of this section—*Kalu v Mehru*, 41 P R 1916.

152 Defect of jurisdiction—The words "defect of jurisdiction" mean a defect of jurisdiction peculiar to the Court in which the proceedings were taken and do not cover such mistakes as the presentation and prosecution of an appeal which did not lie in any Court—*Mohi Singh v Maghan*, 22 P R 1912 244 P L R 1911, 11 Ind Cas 880.

An application for execution to the Court which passed the decree, for the transfer of the decree to another Court, was dismissed on the ground of limitation besides other grounds. It was held that in computing the period of limitation for a subsequent application to the same Court for attachment of the judgment-debtor's property, the time between the filing of the previous application and its dismissal could not be deducted under this section because the previous application was dismissed on grounds other than defect of jurisdiction, and also because the relief sought in the second application was not the same as that sought in the first—*Theerthaswamikal v Venkatarama*, 33 M L J 682. Where a person misconceived his remedy and instead of proceeding by way of an application to set aside an execution sale, brought a suit which was eventually dismissed, the time taken in prosecuting the suit (and an appeal therefrom) cannot be deducted under this section in computing the period of limitation for an application, because the failure of the applicant in the prosecution of his claim by suit cannot be attributed to anything connected with the jurisdiction of the Court—*Ganpathi v Krishnamachari*, 43 M L J 184, 70 Ind Cas 743, A I R 1922 Mad 417. *Murugesu v Jalaram*, 23 Mad 621.

Where the Court in which the wrong proceeding was instituted had jurisdiction, but erroneously held that it had no jurisdiction to grant the relief claimed, the time spent in the Court may be deducted under this section—*Abdulla v Kalumpurath*, 33 M L J 463, 43 Ind Cas 6.

On the 2nd September 1887 the plaintiff filed a suit in the District Munsif's Court to recover his share of the profits under a partnership agree-

ment with the defendant. In his evidence, the plaintiff stated that there had been a settlement of accounts between himself and the defendant. The suit was thereupon dismissed as being cognizable by the Court of Small Causes and the plaint was returned on the 1st March 1889. On the 27th March the plaint was filed in the Court of Small Causes. It was held that the period from 2nd September 1887 to 1st March 1889, i. e., the period of pendency of the first suit in the District Munsif's Court should be deducted under this section—*Saminadha v Samban*, 16 Mad 274.

Where a suit was instituted in the Presidency Small Cause Court against defendants not resident within the jurisdiction, with the leave of the Registrar, and it was subsequently ruled that the Court and not the Registrar was empowered to give such leave, and the suit having been dismissed, a similar suit was then instituted, the leave of the Judge having been first obtained, it was held that this section applied and the plaintiff was entitled to deduct the time during which the first suit was pending, as the Court had no jurisdiction to entertain that suit until its leave was obtained for proceeding against defendants not resident within the Court's jurisdiction—*Subbarau v Yagana*, 19 Mad 90. See also *Ramdeo v Gonesh*, 35 Cal 924 cited at p 214 *ante*.

An application was made before a subordinate Court for execution of a decree passed by itself, but that Court after executing the decree in part transferred it to the Presidency Small Cause Court which proceeded to execute it. Afterwards it was discovered that the transfer of the decree was a mistake as the amount exceeded Rs 2000, and the decree was returned to the subordinate Court. A fresh application for execution was thereafter made. Held that the time during which the decree was in the Presidency Small Cause Court should be deducted in computing the period of limitation for the second application—*Barrow v Javerchand*, 19 Mad 67.

S obtained a mortgage decree against P in March 1887, in the Hajipore Munsif's Court. On the 9th September he applied for execution and on 7th November 1887 the mortgaged property was sold by the Hajipore Court. On appeal the High Court set aside the sale on the 2nd September 1890 on the ground that the Hajipore Court had no jurisdiction. On the 6th September 1890 S applied to the Hajipore Court to transfer the decree to the Muzaffarpur Court, and on the 19th December 1890, S applied for execution to the Muzaffarpur Court. Held that the decreeholder was entitled to a deduction of all the time occupied in executing the decree in the Hajipore Court, from 9th September 1887 to the 2nd September 1890, if not to the 6th September 1890—*Rajbullabh v Joy Kishen*, 20 Cal 29.

Where a defendant is found after the issue of summons in a suit to have been dead before the filing of the plaint the Court has no jurisdiction to decide the suit against him, and the plaintiff may have a deduction of the time occupied in that suit when he subsequently sues the defendant's representatives—*Mohun Chunder v Azam Gazeo*, 12 W R. 45.

Where a plaintiff, relying upon the defendant's representation as to the latter's place of residence, brought his suit in a Court which had no jurisdiction, the time of the pendency of the suit in such Court was held to be properly excluded—*Banee Madhab v Bispro Dass*, 15 W R 69

The plaintiff was allowed under this section to deduct the period during which he was *bona fide* seeking redress from the Revenue Court which had no jurisdiction to deal with the questions raised by him—*Girjanath v Ram Narain* 20 Cal 264

A suit for recovery of price of bricks was brought in the Munsiff's Court which passed an *ex parte* decree, the *ex parte* decree was set aside and the suit was reheard. The Court then being of opinion that the suit was cognizable by the Small Cause Court, returned the plaint for representation to that Court. It was held that the plaintiff was entitled to the benefit of this section—*Ford v Meyer*, 15 A L J 573 40 Ind Cas 447

133. Cause of a like nature —Misjoinder of cause of action was held to be a cause of like nature with want of jurisdiction—*Deo Prasad v Periab*, 10 Cal 86, followed in *Mullik Kefau v Sheo Pershad*, 23 Cal 821 *Mathura Singh v Bhawan*, 22 All 248 (F B), *Venkats v Murugappa*, 20 Mad 48 (F B) *Venkataramani v Ramaraju*, 24 Mad 361, *Narasimma v Muttayan*, 13 Mad 451. The contrary rulings in *Ram Sabhag v Bobin*, 2 All 622, *India Publishers v Aldridge*, 35 Cal 728 and *Tutka Samis v Sheshagiri*, 17 Mad 299 are no longer good law in view of Explanation III added to this section

Misjoinder of parties must also be deemed to be a cause of like nature with defect of jurisdiction. See Explanation III, and *Mathura Singh v Bhawan*, 22 All 248 (F B). The cases of *Jema v Ahmed*, 12 All 207, *India Publishers v Aldridge*, 35 Cal 728, *Krishnaji v Vithal*, 12 Bom 625, in which the contrary view was held must be deemed as overruled by Explanation III

The word *misjoinder* in Explanation III includes nonjoinder. For the purposes of this section there is no distinction between misjoinder and nonjoinder. They are only variations of the same defect. Therefore, where one of several decreeholders applied to execute the decree without impleading the other decreeholders as parties, and the application was dismissed, whereupon a subsequent application for execution was properly presented, held that the time occupied in prosecuting the earlier application in good faith should be deducted under this section—*Seth Ibrahim v Firm of Ghulam Husain*, 15 S L R 21

A misconception of the plaintiff as to the Court in which he ought to sue coupled with the action of the Court in which he instituted the suit on such misconception, in admitting the suit, was held, under the special circumstances of the case, to be a cause similar to defect of jurisdiction—*Seth Khandas v Dahlabha* Bom 182. See this case cited in Note 149 ante

The words *or other cause* refer to cases where the action of the Court is prevented by causes not arising from *laches* on the part of the plaintiff—*Lachman v Vimaloo* 17 W R 266 The words mean some unavoidable circumstance over which no one has any control or something incidental to the Court itself and unconnected with the default or negligence of the plaintiff—*Chander Madhub v Bissessuree* 6 W R 184, *Raja of Faridkot v Sardar Girdaral* 34 P R 1898 Therefore the plaintiff was held not entitled to deduct the time during which she was engaged in prosecuting the first suit which was dismissed owing to the non production of a certificate due to her own laches—*Bat Jumna v Bat Ichha* 10 Bom 604 nor can the plaintiff claim exemption when his first suit was dismissed on account of failure to give notice under sec 80 C P Code—*Manghannai v Fernandez* 5 S L R 181

This section applies where the previous proceeding was dismissed on account of the Court's defect of jurisdiction or some cause of like nature, that is on some such technical ground. It does not apply where the previous proceeding was dismissed after adjudication on its merits—*Issuree unaid v Parbuly* 3 W R 13 *Ardha Chandra v Motangini* 23 Cal 325 (37) *Rajani Bandhu v Kali Prasanna* 74 Ind Cas 279 (Cal) Therefore in calculating the period of limitation prescribed for a suit brought by the adopted son to set aside an alienation made by his adoptive mother the period of pendency of suits brought by or against him to prove or disprove the validity of his adoption will not be deducted because such suits were properly brought and adjudged on their merits—*Kishen v Muddun* 5 W R 32 An objector's claim having been disallowed he brought a regular suit to establish his right and to have the sale stayed. The attached property was however sold pending this suit which was subsequently dismissed on its merits. He then brought another suit for declaration that the property (which was still in his possession) was his and was not affected by the sale. It was held that in calculating limitation for the second suit no deduction could be made for the time consumed in the first suit—*Raghunath v Sooryoo*, 22 W R 162

Where the previous suit was dismissed not on any technical ground of misjoinder of parties or of causes of action but on the ground that having regard to the frame of the suit no cause of action had been established against the defendants held that this section would not apply and the time taken up by the previous suit would not be deducted—*Commercial Bank v Alla voodet* 1, 23 Mad 583

Plaintiff at first instituted a suit in 1893 for possession and mesne profits from 1889 to 1893 (the date of suit) as well as from 1893 to the date of recovery of possession. The suit was decreed in January 1895 but the mesne profits were awarded only up to 1893 (the date of suit) the decree being silent as to the mesne profits from 1893 to 1895. Plaintiff thereupon instituted in April 1898 a second suit for mesne profits from

1893 to January 1895 *Held* that the suit was barred, the time of pendency of the previous suit would not be deducted, because it could not be said that the former Court was unable to entertain the former suit from defect of jurisdiction or other cause of like nature. In fact the Court did entertain the former suit and there was no defect of jurisdiction which prevented the Court from awarding the mesne profits claimed, but it did not decree the mesne profits either through inadvertence or because the claim was not specially pressed—*Hays v Padmanand* 32 Cal 118

Plaintiff's suing by mistake on a foreign judgment, which was a nullity, cannot be held to be a cause of like nature with defect of jurisdiction—*Raja of Faridkot v Sardar Gurdayal*, 34 P R 1898

Where, relying upon a decision of the High Court, a decreeholder instituted proceedings in the Insolvency Court, and then by a subsequent Full Bench Decision of the High Court it was declared that those proceedings must be taken in the Revenue Court and not in the Insolvency Court, whereupon the decreeholder applied to the Revenue Court, *held* that the time during which the proceedings were pending in the Insolvency Court would be deducted—*Parbat v Raja Shiam Rishi*, 44 All 296 (300), 20 A L J 147 66 Ind Cas 214

Res judicata does not constitute a "cause of like nature" within the meaning of this section. Thus, a decree holder made an application for execution of his decree on the 6th October 1913 which was dismissed for default. Thereupon the judgment debtor who also held a decree against the decreeholder applied for execution of his decree against him, and the decree holder made an application on the 15th November 1916 for being allowed to set off his decree against the decree of the judgment-debtor, but the decree holder's application was disallowed on the 23rd May 1918 on the ground of *res judicata*. Subsequently the decreeholder made an application for execution of his decree and claimed to deduct the time between the 15th November 1916 and 23rd May 1918. *Held* that though the decree holder was prosecuting his application for set off with due diligence and in good faith against the same party, yet as his application was dismissed on the ground of *res judicata*, which is not equivalent to want of jurisdiction or other cause of like nature, he was not entitled to get the deduction claimed by him—*Braya Gopal v Tara Chand*, 6 P L J 593

An application for execution of a decree was dismissed because the relief asked for was not in conformity with the decree, the legitimate prayer for the execution of the decree being joined with a prayer which the Court was not competent to grant. *Held* that the time occupied in this application should be deducted in calculating the period for a subsequent application, as the former application was dismissed for a cause of a nature similar to defect of jurisdiction—*Keshore Mal v Jagdish Narain*, 3 Pat 42, 75 Ind. Cas 312, A. I. R. 1924 Pat 471

114 Withdrawal of previous suit This section applies only to cases where the previous suit was *dismissed* by the Court itself because it was unable to entertain it. It does not apply where the previous suit was voluntarily abandoned or *withdrawn* by the plaintiff. When the previous suit had been terminated not by any action of the Court but by the act of the plaintiff he cannot claim the benefit of this section—*Aruna kalan v Lakshman* 31 Mad 136 *Largal v Soleswar* 29 Bom 219 *Ubendra v Surya Kanta* 5 Ind Cas 55 *Krishnaji v Vishal* 12 Bom 65 *Bai Jimna v Bai Ichha* 10 Bom 604 *Pirjale v Pirjale* 6 Bom 681

115 Deduction of time—Where a plaint which had been presented to the wrong Court on the last day of the period of limitation was subsequently returned by the Court for presentation within a week to the proper Court and then the plaint was filed in the proper Court within a week it was held that the suit when so presented was barred by limitation as only the time during which the suit was pending in the wrong Court should be excluded and the fact that the Court had given a week's time should not be taken into account—*Haridas v Saril* 17 C W N 515 18 Ind Cas 121. The principle is that a Court in returning a plaint to a plaintiff in a suit in which it had no jurisdiction had no authority to fix a time within which the plaint was to be presented to a Court having jurisdiction and if it does so that fact will not in any way affect the time to be allowed to the plaintiff—*Gauri Vargish v Pidadala Venkatappa* 5 M H C R 407

So also where a plaint was returned to be re presented to another Court and no steps were taken for 10 days thereafter by which time the suit was barred held that the delay could not be excused—*Fakh Mahammad v Raja* 26 P L R 142 *Sheo Varain v Rani Prasad* 8 N L J 76 A I R 1923 Nag 241

Closing of wrong Court—The last day for filing a suit was 14th June 1908. But as the Court in which the suit was sought to be filed was closed from 14th June to 5th July the suit was filed on 6th July 1908. On 17th February 1909 the Court found that it had no jurisdiction and returned the plaint to the plaintiff for presentation to the proper Court. The plaintiff presented it to the proper Court on the next Court-day i.e. 19th February 1909. It was held that under sec 14 the plaintiff was entitled to the deduction of time between 6th July 1908 and 17th February 1909 i.e. the time during which the suit was *actually prosecuted* in the wrong Court but not to a deduction of the period between 14th June and 5th July 1908 during which the wrong Court was closed held further that the plaintiff could not invoke the aid of section 4 for deducting the latter period as the word Court in that section does not include a wrong Court—*Mira Mohideen v Nallaperumal* 36 Mad 131 *Sleshagiri v Vajra Velayudan* 36 Mad 482 *Govindasami v Sankar Padayachi* 43 M L J 519 69 Ind Cas 724 *Mahind v Ramraj* 14 A L J 310 Contra—*Vasvanappa v*

Krishnadas, 45 Bom 443, where it was held (dissenting from 36 Mad 131) that the period during which the wrong Court was closed should also be deducted.

The time taken in obtaining certified copies of the judgment or order for the mistaken institution of the appeal which ultimately proved infructuous, should also be deducted from calculation, because the plaintiff is said to have been prosecuting a civil proceeding during the period he was taking the preparatory steps for the filing of the appeal by way of applying for copies of judgment and decree—*Lakshmiyam v. Sonatan*, 15 C. L. J. 160.

156. **Suspension of right of action**—Two out of three brothers were dispossessed of their shares in certain properties by the third brother. One of the brothers who were dispossessed brought a suit for the recovery of his share as against the other two brothers as defendants. One of the defendants supported the plaintiff and set up his own right to one third share in the property. An issue was raised between the co-defendants as to whether the defendant who supported the plaintiff was entitled to a certain share. The Court passed a decree not only in favour of the plaintiff but also declared that the defendant had one third share. On appeal the decree of the trial Court was set aside so far as the defendant was concerned. He then filed a suit for the recovery of his share. It was held that he was entitled to deduct the period from the date of the decree of the first Court to the date when that decree was set aside on appeal, i.e., the period during which there was the judgment of the lower Court in his favour in the previous suit, that a Court should relieve parties against injustice occasioned by its acts and oversights, that where the plaintiff could not have sued for some relief which had been decreed to him by mistake, his right of action should be considered as suspended, and that the time during which his right was suspended should be deducted, although it was doubtful whether this section covered the case or not—*Lakhan v. Uadhu*, 35 Cal 200, affirmed by the Privy Council in *Nrityamoni v. Lakhan*, 43 Cal 660, 20 C. W. N. 52, 33 Ind. Cas. 452. See also Note 102 under sec. 9.

The plaintiff purchased a *patni* at a sale under the Patni Regulation in May 1908. The patnidar instituted a suit for cancellation of the sale which was decreed in May 1912. In the interval, on the 14th October 1910 the plaintiff had paid rent to the defendant to prevent further sale under the Regulation. The plaintiff now brought a suit in 1916 for recovery of the money paid by him to the Zemindar as rent, and claimed to deduct the time which was occupied by a proceeding for assessment of mesne profits as between himself and the original patnidar on the basis of the decree for cancellation of the sale. *Held* that the plaintiff was not entitled to a deduction of the period. There was not since the 14th October 1910 any period of time during which the right of the plaintiff to institute the present suit was suspended by reason of circumstances over which he had no control, so as to entitle him to invoke the aid of the rule recognised

by the Judicial Committee in 7 M I A 323 12 M I A 244 and 43 Cal. 600, and to deduct the period—*Janaki Nath v Begov Chind Mahatab*, 26 C. W N 271 60 Ind Cas 698, 33 C I J 366 1 or other cases, in which the principle of the suspension of cause of action has been discussed, see *Niranka v Indrakishna* 28 C W N 1009 A I R 1925 Cal 67, *Dina Nath v Jadu Nath* 29 C W N 102 A I R 1925 Cal 456, and the cases cited in Note 102 under sec 9.

157 *Explanation 1—Termination of proceedings*.—Where a plaint is ordered to be returned for presentation to the proper Court but is actually returned three days later the suit in the wrong Court is said to terminate on the day on which the plaint is actually returned and not on the day on which it is ordered to be returned. The reason is that a party cannot always get back his plaint on the same day on which it is ordered to be returned and as long as the plaintiff has exercised ordinary diligence in pursuing his claim there is no reason why the period up to the day when he gets back his plaint should not be deducted—*Nagindas v Maganlal*, 46 Bom 211 64 Ind Cas 100 A I R 1922 Bom 160, *Bastanappa v Arishnadav* 45 Bom 443 *Mohendra v Nanda*, 17 C W N 1043, 20 Ind. Cas 183.

A suit to set aside an order was filed in the munsiff's Court on the 27th September 1882 which he dismissed as being beyond his jurisdiction. On appeal the District Judge held that the Munsiff had jurisdiction, and ordered him to try the case. On further appeal, the High Court set aside the order of the District Judge on 17th August 1883 and directed him to ascertain the value of the land in dispute in the suit and pass a fresh order. After that inquiry was held the Judge passed an order on 30th October 1883 confirming the original order of the Munsiff. The plaintiff thereupon filed a second suit on 8th August 1884. Held that the plaintiff was entitled to be allowed the whole of the time occupied in the first suit up to the date of the final order of the District Judge (30th October 1883), the order of the High Court did not terminate the prior suit, that order directed the Judge to ascertain the market value of the land and to pass a fresh order, and the suit terminated only when the District Judge passed a fresh order after holding the inquiry—*Sankaram v Parvathi*, 12 Mad 434.

Where a plaint was returned on the 27th June with a permission to refile it in the proper Court, and with a direction to the plaintiffs to pay costs, and an order fixing the amount of costs was recorded on the 30th June, it was held that the return of plaint on June 27 terminated the connection of the Court with the suit, and though the costs were calculated later, the plaintiffs were not prosecuting their suit in that Court after the plaint had been returned—*Ganga Charan v Akhil Chandra*, 24 C. L. J. 355, 35 Ind Cas 593.

158. *Application of section to special or local laws*.—According

section 29 as now amended, this section applies although the case is governed by a special or local law of limitation as for instance, it applies to a suit under section 78 of the Madras Rent Recovery Act (VIII of 1865)—*Kallajappa v Lakshanpathi*, 12 Mad 467, or to a suit under the Madras Boundary Act (XXVII of 1860)—*Seshamma v Sankara*, 12 Mad 1, or to a suit under sec 86 of the Bombay District Municipal Act (VI of 1873)—*Guracharya v President*, 8 Bom 529, or to a proceeding under the Provincial Insolvency Act—*Dropadi v Hira* 34 All 496 (F B)

The following cases in which this section was held inapplicable to suits or applications under special or local laws on the ground that those laws were complete codes in themselves, are no longer good law in view of the recent amendment of section 29 —*Nagendra v Mathura*, 18 Cal 368 (suit under Act X of 1859) *Abdul Hakim v Latifunnessa*, 30 Cal 532, *Hakimuddin v Sahibuddin* 47 Cal 300 F B, *Khagendra v Bamani*, 24 C W N 29 (cases under sec 77, Registration Act), *Tran Deva v Parameshwaraya* 39 Mad 74 (case under Prov Insolvency Act), *Chowdhury Kesri v Giant Ray*, 29 Cal 626 (application to set aside sale under sec 310 A C P Code 1882), *Lakhsman v Keshav*, 6 N L J 205, A 1 R 1923 Nag 306 (suit under C P Land Revenue Act)

15 (1) In computing the period of limitation prescribed for any suit or application for the execution of a decree, the institution or execution of which has been stayed by injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or made, and the day on which it was withdrawn, shall be excluded.

Exclusion of time during which proceedings are suspended

(2) In computing the period of limitation prescribed for any suit of which notice has been given in accordance with the requirements of any enactment for the time being in force, the period of such notice shall be excluded

159 Scope —The words 'or application for the execution of a decree' have been added in the Act of 1908 Subsection (2) is new

Under the old law this section applied only to suits, and therefore where the execution of a decree was stayed by an injunction, it was held that the time during which the injunction was in force was not to be excluded in computing the period of limitation—*Rajaratnam v Shevalajam* 11 Mad 103, *Kalyanbhai v Ghanashumtal*, 5 Bom 29, *Lutful v Sambhindri*, 8 Cal 248, *Amulja v Peco*, 7 Ind Cas 886

But the Court in many cases relieved the decree holder by treating the application for execution made after the withdrawal of an injunction as an application to revive or continue some previous application (Article

181] See *Ballini Lal v. Bala Bala* 6 All 23 *Sakina v. Ganesh* 3 P. L. J. 103 *Palaiahkari v. Ghanashankari* 5 Bom 29 *Varayan v. Sona* 24 Bom 345 *Chintamani v. Balaistri* 16 Bom 201 *Issur v. Abdul* 4 Cal 877 *Ahmedulla v. Behin Behari* 40 Cal 407 *Gurudao v. Amrit* 33 Cal 680 *Lakshmi v. Ballam* 17 All 425 *Rangiah v. Nanjappa* 26 Mad 280. See these cases cited under Article 181.

Put now under the present section the time during which the execution is stayed by an injunction or order shall be excluded. See *Bai Ujam v. Bai Rukhmani* 18 Bom 151 *Giles v. Hardeo* 31 All 436.

160 Application of section to special laws.—Before sec. 29 was amended by Act V of 1908 it was held that the provisions of section 15 could not be applied to a special period of limitation prescribed by the Bengal Tenancy Act and therefore subsection (1) could not apply to a suit instituted under the terms of Section 104H of the Bengal Tenancy Act. Such a suit was to be brought within six months as specified in that section and the plaintiff was not entitled to exclude the period of notice to the Secretary of State (under sec. 80 C. P. Code) whom he had made or joined as a defendant—*Secretary of State v. Gangadhar* 15 Cal 934. *Gangadhar v. Janakmani* 22 C. W. N. 317 *Secretary of State v. Shib Varan* 16 Cal 109. See also *Juratai v. Mahabir* 40 All 108 16 A. L. J. 21 where it was held that the word prescribed in this section referred to a period prescribed by the Limitation Act. These rulings are no longer good law in view of the present amendment of Sec. 29. See *Srinivasa v. Secretary of State* 38 Mad 92 where subsection (2) of this section was applied to a suit under sec. 50 of the Madras Revenue Recovery Act (II of 1864).

161 Section 48 C. P. Code.—The period of 12 years mentioned in Section 48 Civil Procedure Code is not a period of limitation in the strict sense of the term and consequently Section 15 of the Limitation Act cannot apply to it. Hence an application for execution of a decree stayed by injunction or order of Court filed after twelve years from the date of the decree cannot be saved by excluding under section 15 the time during which execution was stayed—*Subbarayan v. Natarayan* 43 Mad 785 43 M. L. J. 168, 11 R. 1922 Mad 263.

162 Injunction or order.—In computing the period of limitation for execution of a decree the period during which the execution has been stayed or suspended will have to be excluded though no execution proceedings were pending at the time—*Goundarajulu v. Ranga Row*, 40 M. L. J. 124.

An adjournment of the hearing does not amount to an injunction or order staying execution of the decree—*Thakamani v. Nadar*, 36 Ind. Cas. 939 (Cal).

In an appeal to the Privy Council, the appellant whose suit has been dismissed by the High Court offered as security for costs a rent decree in

another suit obtained by him against the respondent. It was held that the acceptance of the rent decree as security did not involve any order staying its execution so as to enable the appellant to deduct the time that elapsed between the acceptance and his subsequent application for execution of the rent-decree—*Midnapore Zamindari Co v Deputy Commissioner*, 3 P I J 132

An order of adjudication adjudging the defendant as an insolvent is not an order staying suit against the defendant, because its effect is not to stay proceedings against the defendant insolvent but merely to impose on the plaintiff the necessity of obtaining leave from the Court to sue under Section 16 (2) of the Provincial Insolvency Act. Therefore the period during which the insolvency proceedings were pending could not be excluded—*Ramaswami v Gobindaswami* 42 Mad 319, 36 M L J 104, 49 Ind Cas 625. *Siddhraj v Ali Haji* 47 Bom 244, A I R 1923 Bom 33. But an order striking off an execution petition on the ground that the judgment-debtor had been adjudicated an insolvent and the decretal amount had been entered in the schedule of debts amounts to an injunction within the meaning of this section—*Tara Chand v Jugal*, 1919 P W R 17

Where the tenants instituted a suit against the landlord to set aside the Collector's order passed under Sec 70 of the Bengal Tenancy Act and obtained an injunction restraining the landlord from executing the Collector's order pending the disposal of the suit, and upon that suit being finally dismissed the landlord applied for execution of the Collector's order held that limitation for execution did not run for the period during which the injunction subsisted—*Balukchand v Nathuni*, 2 P I J 24 (29)

In computing the period of limitation for execution of a decree the decreeholder is entitled to deduct the period during which the execution is stayed by an injunction and the fact that the injunction related only to a part of the decree is immaterial—*Bai Ujam v Bai Rukhmanti*, 38 Bom 153 (155)

The 'order' mentioned in this section refers to an order of a Civil Court, and not to an order of Government or Royal Proclamation by which the plaintiffs (a German Bank) were debarred from bringing a suit owing to declaration of war with Germany—*Deutsche Asiatische Bank v Hira Lal* 46 Cal 526 (533), 23 C W N 157

This section is not confined to cases of direct stay or injunction, but can be extended to orders which indirectly but very approximately and effectually cause a delay. Thus where pending an appeal to the Privy Council by the judgment-debtor the High Court made an order allowing the decreeholder to execute the decree on his furnishing security for the amount of the decree within one month, but the decree-holder being unable to find the required security, his application for execution was dismissed, and the Privy Council eventually dismissed the appeal for default of prosecution, whereupon the decree holder again applied for execution; held,

that the order of the High Court, whatever be the form of it did in fact stay the execution of the decree and prevent him from executing the decree unconditionally as he was entitled to do. As the condition could not be performed the effect was to stay execution altogether and under this section the time during which the order was in force should be deducted in reckoning the period of limitation for filing the present execution petition—*Pandey Sadeo Narain v Radha Kuar* 5 P L J 39 (43 44) 53 Ind Cas 9

Where pending an appeal from a preliminary decree for foreclosure, a Receiver is appointed for the management of the mortgaged properties with a direction to pay interest held that so long as the order appointing the Receiver stands, the defendants are entitled to pay off the decretal amount and that consequently the order of appointment of the Receiver operates as a stay of the plaintiff's right to apply for a final decree or for possession and that therefore the period between the making of the order and the date on which the Receiver is discharged must be excluded in computing the period of limitation for an application for a final decree for foreclosure—*Chakley Narain v Kedar Nath* 1 Pat 135 3 P L T 565, A I R 1922 Pat 312

In a suit brought by the widow of a deceased partner to wind up the partnership the surviving partner was prohibited by the Court, at the instance of the plaintiff from collecting debts due to the firm. Subsequently a Receiver was appointed to get in the assets of the firm. It was held that in a subsequent suit by the Receiver against a debtor the time between the date of the injunction and the appointment of the Receiver must be deducted from computation of the period of limitation—*Sammugan v Moidin* 8 Mad 219

An order staying execution of the decree must be a clear one, but it is not necessary that the order should be in writing—*Vishvanath v Narsu*, 23 Bom L R 107

An order under sec 2 of the Chota Nagpur Encumbered Estates Act bringing the estate under protection is a vesting order staying all proceedings, and under sec 15 of the Limitation Act there should be a revivor, the period of protection being excluded—*Mathura Prasad v Jageshwar Prasad* 5 Pat 404 A I R 1926 Pat 260, 94 Ind Cas 624

Attachment—An order of attachment of a debt under sec 268 of the C P Code (1882) is not an injunction or order staying a suit on the debt within the meaning of this section, because the order does not prevent the creditor from bringing a suit on the debt, but only from receiving from the debtor the amount thereof, if therefore the creditor does not bring a suit on the debt within the prescribed period it will be barred—*Shib Singh v Sita Ram*, 13 All 76, *Beti Maharani v Collector of Etawah*, 17 All 198 (P C), *Rangasami v Thangavelu*, 42 Mad 637, 50 Ind Cas 380. And the result is the same if the attachment of the debt be

before or after judgment—*Beli Maharam v Collector of Flavelah* 17 All 198 (P C)

An attachment before judgment of a decree and a consequent order issued by the Court attaching the decree amounts to an absolute prohibition of the execution of the decree by anybody it amounts to an injunction and the period of its pendency is excluded under this section in computing the period for executing the decree—*Raj tagripally v Bhavan Shankaran* 47 Mad 641 47 M L J 4 80 Ind Cas 103 A I R 1921 Mad 673

According to the Calcutta High Court an attachment of a decree under O 21 r 53 C P Code has the effect of staying the execution of the decree and the period occupied by the pendency of such attachment will be excluded in calculating the period of limitation for execution of that decree—*Kiranshaski v Chandrika* 30 Ind Cas 587 (Cal) But the Bombay High Court holds that sec 15 only applies to an absolute stay and not to a limited stay as would be ordered under O 21 r 53 The stay does not prevent the holder of the decree sought to be executed or his judgment-debtor from seeking to execute the original decree and that being the case time must be taken as running against them—*Chanbasappa v Holibasappa* 48 Bom 485 (491) 26 Bom L R 317 80 Ind Cas 237 A I R 1924 Bom 383

163 Deduction of time.—Under this section the decree holder is entitled to deduct the period between the day on which the injunction is issued and the day on which it comes to an end Limitation will commence to run as soon as the order granting the injunction is withdrawn If the injunction comes to an end by the order of the Court of first instance limitation will run from the date of the order of that Court and the fact that there has been an appeal from that order will not entitle the decree holder to deduct the time of the pendency of the appeal Thus an application for execution of a decree was made on the 18th April 1914 and while this application was pending a suit was instituted for a declaration that the decree had been obtained by fraud and on 9th December 1914 a temporary injunction was obtained in this suit restraining the decree holder from executing the decree On the 26th April 1915 that suit was dismissed and with that dismissal the bar of injunction came to an end An appeal was filed and it was dismissed on the 19th April 1917 Thereafter the decree holder again applied for execution on 11th June 1918 Held that the application was barred because limitation ran from the time when the injunction came to an end by the order of the first Court on 26th April 1915 and not from 19th April 1917—*Balwant v Budh Singh* 42 All 564 (566) 18 A L J 617 56 Ind Cas 106 During the execution of a decree a stranger claimed the property attached and applied for an injunction restraining the execution sale He also brought a suit for a declaration that the property was not liable to sale The execution Court granted a temporary injunction pending the final decision of the suit The suit

was eventually dismissed on 25th November 1913, but an appeal was filed therefrom which appeal was likewise dismissed on 2nd May 1917. *Held* that the injunction came to an end on the 25th November 1913, the date on which the first Court dismissed the suit, and not on the 2nd May 1917 when the appeal was dismissed—*Madho Prasad v Dhabadi*, 41 All 383 (386)

164. Sub-section (2)—Notice.—Where a plaintiff, in a suit against the Government, is required to give notice to the Government under section 80 of the Civil Procedure Code, he is entitled under sub-section (2) to exclude the period of notice (*i.e.* two months) in computing the period of limitation prescribed for the suit—*V IV Ry v Ramdhan*, 52 P R 1917, 38 Ind Cas 600. In a suit falling under Article 16, the plaintiff is entitled to deduct the period of two months' notice which he has to give to the Government before bringing the suit—*Secretary of State v Venkataswami*, 46 Mad 483. Where the plaintiff brings a suit against a State Railway, he is entitled to deduct the period of two months' notice given to the Secretary of State—*B & V IV Ry v Ram Sarup*, 3 P. L. T 643, 70 Ind Cas 109 A I R 1922 Pat 549. If in a single suit against several defendants the plaintiff is entitled to a deduction of time as against one defendant under sec. 15 (2) he is entitled to a deduction against *all* the defendants—*Ibid Khanderao v Channmallappa* 26 Bom L R 364 A I R 1924 Bom 364.

But where a plaintiff under a mistake of law or fact conceives that he has a cause of action against the Secretary of State or a public body in addition to his cause of action against a private person and joins without reason the Secretary of State or the public body he shall not be entitled to invoke the assistance of this section and to extend the period by two months—*Lad's Prasad v Nizamuddin* 22 O C 342. Where no notice under sec. 80 of the C P Code is necessary to be given the fact that it has been given will not entitle the plaintiff to exclude the period of such notice—*Weston v Peary Mohan* 40 Cal 898 (949).

The plaintiff is entitled to exclude the period of two months' notice required to be served under section 31 of the Court of Wards Act on defendants who were Government wards at the time when the cause of action arose and the extension cannot be refused on the ground that they ceased to be wards before the suit came on for hearing—*Khanderao v Channmallappa*, 26 Bom L R 364 A I R 1924 Bom 364.

Sub-section (2) must not be read into the provisions of Sections 6 and 8. This sub-section has nothing to do with the extension of time allowed to persons under disability under sections 6 and 8. Thus, section 49 of the Court of Wards Act requires two months' notice to be given before the institution of a suit under that Act, but this period of two months shall not be added to the extension of time allowed to persons under

disability under sections 6 and 8—*Narasimha v Krishna Chandra* 37 M L J 256.

16 In computing the period of limitation prescribed for

Exclusion of time a suit for possession by a purchaser at a
during which proceeding sale in execution of a decree the time du
ing to set aside execu sale are pending ring which a proceeding to set aside the
tion sale are pending ring which a proceeding to set aside the
sale has been prosecuted shall be excluded

165 The period of limitation for a suit for possession by an
auction purchaser referred to in this section is prescribed by Articles 137
and 138

The word proceeding in this section is not restricted to an application
to set aside a sale but is comprehensive enough to include a suit as well
as an application the obvious intention of the Legislature is to allow an
exclusion of the period during which the validity of the sale is impeached
whether by a suit or by an application—*Prasanna v Kishore* 21 C W N
304 38 Ind Cas 547

17 (1) Where a person who would if he were living have

a right to institute a suit or make an appli
cation dies before the right accrues the
Effect of death before right to sue accrues cation dies before the right accrues the
period of limitation shall be computed from
the time when there is a legal representative of the deceased
capable of instituting or making such suit or application

(2) Where a person against whom, if he were living a right
to institute a suit or make an application would have accrued
dies before the right accrues the period of limitation shall be
computed from the time when there is a legal representative of
the deceased against whom the plaintiff may institute or make
such suit or application

(3) Nothing in sub-sections (1) and (2) applies to suits to
enforce rights of pre-emption or to suits for the possession of im-
moveable property or of an hereditary office

166 Principle —This section adopts the general rule that a complete
cause of action cannot accrue unless there be a person in existence capable
of suing another person in existence capable of being sued. It clearly
assumes the existence of the general law that the legal representative holds
the property in the right of the deceased and that it is his duty to sue in
respect of a cause of action that has accrued after the death of the testator
and it further provides that the time shall not begin to run until the ques

tion as to who is the legal representative of the deceased has been solved—*Kesho Prasad v Madho Prasad* 3 Pat 880, A I R 1924 Pat 721. The principle of this section is that in order that a right of suit or cause of action may exist, there must be in existence a person capable of suing and another capable of being sued. Until both these persons exist, there cannot be a perfect cause of action—*Darby and Bosanquet on Limitation*, 2nd Edn pp 49-50. There can be no limitation until there is a person in existence competent to sue—*Seeti Kutti v Kunhi Pathumma*, 40 Mad 1040 (1063). *Marikkam v Thanikachellam*, 4 L W 369. *Palamandi v Vadamalai*, 2 L W 723. Therefore where no trustee was appointed for a temple by the committee for 24 years from 1883 to 1907, and the defendant had been in adverse possession of the office of trustee before 1907, the adverse possession by the defendant commenced only from 1907, the year in which the plaintiff was appointed to the office of trustee—*Palanisappa v Vadamalai*, 18 Ind. Cas 373. On the same principle, so long as there was no Receiver appointed for the management of a temple, there was none competent to sue on behalf of the temple, and the right to sue accrued to the temple from the time when the plaintiff was appointed Receiver—*Annunalai v Gobiuda Rao*, 46 Mad 579. In a suit by a legal representative of the principal against the agent, time would not run until there was a legal representative of the principal constituted—*Murray v East India Co.* (1821) 5 B & A 204.

167. *Before the right accrues*.—To bring this section into operation, the death must occur *before* the right to sue or make an application accrues. If the right accrues in the life time of the deceased, the period of limitation begins to run from the date of accrual, and it matters not, as far as limitation is concerned in that case, whether by a will proved or by any other means a legal representative comes into existence or not—*Rhodes v Smethurst*, 4 M. & W 42. *Boatwright v Boatwright*, L R 17 Eq 71. See section 1.

168. *Capable of suing*.—The expression 'capable of suing' is the equivalent of 'not under legal disability to sue'. It cannot refer to incapacity arising from want of means or absence or other physical causes. What legal disabilities incapacitate from suing are pointed out in section 6, amongst which infancy is the foremost—*Rivett Carnar v Goculdas*, 20 Bom. 15 (at p 44).

Section 6 of the Limitation Act must be read in conjunction with this section, and the operation of the earlier section must be regarded as qualified by and subject to the rule prescribed in the latter section. Thus, where a partner died in 1896 leaving a widow and infant sons, and the widow took out letters of administration to the deceased's estate in June 1896, limited during the minority of the sons, and the eldest of the minors who attained majority in 1903 instituted the present suit in 1904 against the surviving partner, on behalf of himself and his infant

brothers, for an account and share of the profits of the dissolved partnership, held that their infancy did not save limitation because the effect of the grant of the letters of administration to the widow was that the entire estate of the deceased vested in her, and she represented in every respect the estate of her husband and therefore time began to run from the date on which the plaintiff's mother obtained letters of administration—*Mohit v Raj Narain*, 9 C W N 537 It is submitted, however, that this view of the law which practically modifies the provisions of section 6, is totally incorrect

169 Legal representative —For definition, see C. P. Code, sec 2 (11)

An executor or administrator of a deceased person is his legal representative for all purposes—Sec 211, Indian Succession Act (XXXIX of 1925) The executor is a legal representative within the meaning of this section even though he has not yet taken probate, for the taking of probate is not a condition precedent to the filing of suits but is only necessary before getting a decree Time therefore begins to run against the executor from the date of the testator's death—*Balakrishnuudu v Narayanaswamy*, 37 Mad 175 24 Ind Cas 852

The executor of a will capable of probate in British India is a legal representative capable of instituting a suit from the date of the testator's death and not only from the date when he obtains probate The title and authority of the executor are derived from the will and not from the probate An administrator on the other hand derives his title solely under his grant and cannot sue before he gets his letters of administration—*Meyappa Chetty v Subramanian Chetty*, 20 C W. N 833 (P. C.), 35 Ind Cas 323

A certificate of administration under Bombay Reg VIII of 1827 only confers a right of management and does not constitute the holder of such certificate the representative of the estate for the purpose of distributing it among the co sharers, consequently he is not a person against whom a sharer can institute a suit for his share—*Keskar v Narayan*, 14 Bom 236

The person in possession of the estate of a deceased Hindu must, till some other claimant (e g under a will of which no probate has been granted) come forward, be treated for some purposes as his representative—*Prosunno v Krishna*, 4 Cal 342

Where, after the death of one of the partners in a partnership business, the Administrator General obtained letters of administration and instituted a suit on behalf of the infant heir of the deceased partner for partnership accounts and recovery of assets, it was held that the Administrator-General must be treated as the legal representative, and the period of limitation as regards the suit would run from the date of the issue of the letters of administration and not before—*Bhagwandas v. Russell-Carnac*, 23 Bom. 544 (P. C.), affirming 20 Bom. 15.

In a suit for an account accruing to the employer on the death of his

manager against the manager's representatives, limitation will not commence to run until administration has been taken out to such manager's estate—*Laltes v Calcutta Larding and Shipping Co.* 7 Cal 627

Subsection (3) —The third subsection provides that the rule of this section shall not apply to suits to enforce rights of pre-emption or to suits for the possession of immoveable property or of an hereditary office, because the application of the rule to such cases would tend to create insecurity of title—*Kesho Prasad v Madho Prasad*, 3 Pat 880, A I R 1924 Pat 1

18 Where any person having a right to institute a suit or make an application has, by means of fraud, been kept from the knowledge of such right or of the title on which it is founded, or where any document necessary to establish such right has been fraudulently concealed from him, the time limited for instituting a suit or making an application—

(a) against the person guilty of the fraud or accessory thereto, or

(b) against any person claiming through him otherwise than in good faith and for a valuable consideration, shall be computed from the time when the fraud first became known to the person injuriously affected thereby, or, in the case of concealed document, when he first had the means of producing it or compelling its production

169A. Scope —The provisions of this section do not apply to criminal cases, a complaint of a criminal offence is not a suit or an application—*Empress v Vageshappa*, 20 Bom 543

The principle is that the right of a party defrauded cannot be affected by lapse of time or by anything else done or omitted to be done by him, so long as he remains, without any fault of his own, in ignorance of the fraud which has been committed—*Rolfe v Gregory* 4 DeG J & S 576 (579), *Darby and Bosanquet*, 2d Edn, pp 261, 262

170 Fraud —Mere non disclosure of a transaction does not amount to fraud' That term, as used in sec. 18, means and can only mean active deceit in defrauding or endeavouring to defraud a person of his rights by artful device Thus where a person transferred his immoveable property to his wife in lieu of her dower by a registered deed and both were so conducting themselves relating to the property that a pre emptor was kept away from the knowledge of any such transfer, but it was proved

neither the transferor nor the transferee had any intention to *conceal* the transfer from the pre-emptor and were able to consistently explain their conduct, *held* that under the circumstances the pre-emptor was not entitled to claim exemption under this section—*Ghulam Raza v Sardar Khan*, 86 P R 1902 Mere silence on the part of the vendor and the vendee is not fraud To prove fraud within the meaning of this section, there must be some distinct act done with the intention of deceiving the pre-emptor or concealing the fact of sale from him—*Gauhati Mal v Janti Mal*, 73 P R 1885 *Ghisa v Hayat* 120 P R, 1883 It must be shown that there was an industrious and artful concealment of the fact of sale, and the act must be such as to necessarily lead to the inference of a design to keep the pre-emptors in the dark The mere absence of a public notification of the sale is not enough to bring sec 18 into operation—*Arsala v Yar Muhammad*, 32 P R 1881

This section applies only to such fraud as amounts to *concealment* and is intended to keep from the injured party the knowledge of the wrong or its remedy This section therefore can have no application where the fraud alleged by the party applying to set aside an execution sale is under statement of the value of the properties in the sale proclamation—*Rai Kishori v Mukunda* 15 C W N 965 *Narayan v Damodar*, 16 C W N 894 But where the defendant wrongfully collected the money due to the plaintiff, and not only did he not inform the plaintiff of it but even brought a false suit to cover his tricks *held* that there was fraudulent concealment which brought this section into operation, and in a suit brought by the plaintiff to recover the money, time did not run until he was aware of those collections—*Sahib Ram v Govindi*, 43 All 440

The fraud contemplated in this section is the fraud committed by the party against whom a right is sought to be enforced, i.e., the fraud of the defendant or some person through whom he derives his title, it does not mean the fraud of a third person—*Ramdoyal v Ajoodhia*, 2 Cal 1 If it is alleged that the fraud was committed by the servant or agent of the defendant it must be shewn that it was committed for the general or special benefit of the principal and not for the private purposes of the servant or agent—*British Mutual Banking Co v Charnwood Forest Ry. Co*, 18 Q B D 714

Kept from the knowledge of such right'—This section applies only when the plaintiff has been kept from the *knowledge* of his right to do a certain thing by fraud of the other party, and not where he is so kept from *exercising* his right—*Gulam Musafar v. Goloke*, 25 Ind. Cas 884 The *knowledge* of a right and the *exercise* thereof are fundamentally different things Where a judgment-debtor paid the amount of decree out of Court but the decree holder did not certify the payment under O 21, rule 2, C. P. Code, and consequently the judgment-debtor was kept from the *exercise* of his right to make an application under O 21, rule 2 (2), section

18 of the Limitation Act did not apply, because it could not be said that the judgment-debtor was kept from the knowledge of his right to make the application—*Birao v Jaimurat*, 16 C W N 923 (927) Where it was alleged that the decree holders had fraudulently kept the judgment debtor from exercising his right to apply to the Court to certify an adjustment under O 21, r 2, by giving him assurances no extension of time was granted—*Chetty Firm v Lon Pow*, 1 Bur L J 226, 68 Ind Cas 924, A I R 1923 Rang 103 But where the plaintiff was ousted from his property under colour of a fictitious revenue sale in pursuance of a fraudulent contract, and the fraud had been so contrived as to make him believe that he had no right of action at all, it was held that the plaintiff was protected against limitation until he came to know of the fraud—*Durhanath v Ajoodhya*, 21 W R. 109

The mere act of fraud is immaterial The plaintiff or applicant must show that he has by means of the fraud been kept from the knowledge of his right to institute a suit or make an application—*Asanand v Jhangl*, 1919 P W R. 2, *Nand Ram v Ishar*, 27 P L R 24, 92 Ind Cas 597, *Jalindra v Brojendra*, 19 C W N 553, *Biman Chandra v Promotho*, 49 Cal 886 (891), *Ramchandra v Harseo*, 20 N L R 23, A I R 1924 Nag 94 Thus, in an application to set aside a sale on the ground of fraud, the applicant will have to prove that his right to set aside the sale has been kept concealed from his knowledge by the fraud of the decree holder or auction purchaser, it is not enough for him to shew that the execution proceedings were irregular and fraudulent—*Kailash v Bissonath*, 1 C W N 67, *Narayan v. Mohanik Damodar* 16 C W N 894, 16 Ind Cas 464, *Bajrang v Sonjhar*, 6 P L T 507, A I R 1925 Pat 521, *Nabin Chandra v Bipin Chandra*, A I R 1920 Cal 229 87 Ind Cas 555 In a suit to recover landed and other property to which the plaintiff obtained title by inheritance he endeavoured to set aside the defendant's plea of limitation by alleging fraud, it was held, that even if the allegation was true still as it did not exhibit concealment of the cause of action and the alleged fraud did not constitute an ingredient in the plaintiff's cause of action, he could not get rid of the effect of time—*Byj Nath v Brosno*, 9 W. R. 255

The mere ignorance of the plaintiff as to his right to sue is no excuse under this section It is only where such ignorance has been brought about by the fraud of the other party that this section applies—*Lokenath v Chintamani*, 16 Ind Cas 547 Thus, where an application to set aside a sale on the ground of fraud is made beyond the period of limitation, it is incumbent on the applicant to show that not only had he no knowledge of the sale but that he was kept from that knowledge in the manner and by the act of the person specified in this section—*Purna v Anukul* 36 Cal 654

On the other hand, if it is proved that the plaintiff was fully

of his right, inspite of the fraud practised upon him, he is not entitled to the benefit of this section, in as much as he was not kept from the knowledge of his right—*Jotindra v. Brojendra*, 19 C. W. N. 553, 24 Ind. Cas. 249.

Where the judgment-debtor had been fraudulently kept from the knowledge of the sale, he was necessarily kept from the knowledge of the right to have the sale set aside, and section 18 would apply to such a case—*Jotindra v. Brojendra*, (supra)

171. Evidence—Burden of proof.—The fraud must be proved by the person alleging it. It is for the plaintiff to give in the first instance clear proof of the fraud alleged by him. The Court will not presume it from the mere existence of suspicious circumstances—*Bhagwan v. Ida*, 1903 P. L. R. 27, *Biman Chandra v. Promotha*, 49 Cal. 886, 36 C. L. J. 295, 68 Ind. Cas. 94.

Where fraud is charged against the defendant, it is an acknowledged rule of pleading that the plaintiff must set forth the particulars of the fraud which he alleges, general allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud—*Wallingford v. Mutual Society*, 5 App. Cas. 685 (per Lord Selborne); *Gunga v. Tuluckram*, 15 Cal. 533 (P. C.); *Krishnaji v. Wamanaji*, 18 Bom. 144. The allegations must be specified in particulars and detail, and the finding of the Court ought to be precise as to the particular acts and intentions constituting the fraud—*Nihal Ch. and v. Faujdar*, 3 P. R. 1882; *Ghulam Raza v. Sardar Khan*, 86 P. R. 1902. Thus, where the judgment-debtor applies to have the execution sale set aside on the ground of fraud, and seeks to take advantage of this section, the Court is bound to find when and how the fraud was committed and as to whether the judgment-debtor was kept from the knowledge of the execution-proceedings and sale. There must be a distinct allegation of fraud in the petition, and the party relying upon fraud must state serialim and in detail the facts constituting the fraud, vague or general allegations of fraud being of no avail. He must state further as to how the fraud was practised, how he was kept out of the knowledge of the execution proceedings and the sale, and how he came to know of the sale—*Das Narayan v. Mir Mahammad*, 6 P. L. J. 319 (323), 2 P. L. T. 401.

Where the allegations in the plaint do not of themselves necessarily imply fraud on the part of the defendant, nor suggest any such imputation, sec. 18 would have no application. On the other hand, if the facts stated in the plaint necessarily suggest fraud on the part of the defendant, the mere omission in the plaint to expressly stigmatise the defendant's conduct as fraudulent would be no bar to the plaintiff's relying on the provisions of this section—*Radha Krishna v. Delhi Cloth Mills*, 32 P. R. 1913.

When once the fraud has been established by the plaintiff, the burden

is shifted on to the other side, and it is for the defendant who sets up limitation to show that the plaintiff had had clear knowledge of the facts constituting the fraud at a time which is too remote to allow him to bring the suit—*Rahimbhoy v. Turner*, 17 Bom 341 (P C), *Basiruddin v. Sonaula*, 6 Ind Cas 154, *Irjun v. Gunendra*, 18 C W N 1266, *Ram Kinkar v. Siku*, 27 C L J 518, *Vithappa v. Basgoada*, 14 Bom L R 771; *Abdul Hakim v. Muhammad Yar*, 12 P R 1898, *Gordhan Das v. Ahmed*, 34 P R 1904, *Biman Chandra v. Promotha*, 49 Cal 886, 36 C L J 295, A I R 1922 Cal 157, *Ram Chandra v. Hardeo*, 20 N. L R 23, A. I. R. 1924 Nag 94.

In 1914 the father of a minor obtained a decree, and died before execution. In September 1915 the judgment-debtor got himself appointed as guardian of the minor's property. In June 1921 the mother of the minor got the judgment-debtor discharged from the guardianship and was herself appointed as guardian of her minor son. She then applied in August 1921 to execute the decree against the judgment-debtor. The latter pleaded limitation. Held that the judgment-debtor who got himself appointed as guardian was under the obligation of enforcing against himself the decree which had been obtained against him, and the burden lay heavily upon him to show that he had made a full disclosure to the Court of his indebtedness to the estate; otherwise the Court would assume that no such disclosure was made and that he perpetrated a fraud both on the Court and on the minor by not making the disclosure. The judgment debtor could not rely on his own fraud, and the period between September 1914 and June 1921 must be excluded from computation in calculating the period of limitation: the decree was not therefore time barred—*Gobinda Lal v. Valmi Fanta*, 5 Cal 63, 88 Ind Cas 61, A I R 1925 Cal 534.

172. Application to set aside sale.—Where irregularities affecting the validity of a sale have, by the fraud of the judgment-creditor or other parties to the sale, been kept concealed from the judgment-debtor, he is entitled to make an application against the party guilty of the fraud or accessory thereto, such application under section 311 C P Code 1882 (O XXI, r. 90 of the Code of 1908) as he may be entitled to make, limitation will be counted from the time when the fraud first became known to the appellant, and it is immaterial that the sale was confirmed. The confirmation of the sale ought not to be used as a shield for the fraud by which the Court has been induced to make the sale itself—*Mahendra v. Gopal*, 17 Cal 769 (dissenting from *Gobinda v. Umacharan* 14 Cal 619), *Sheo Ram v. Ikram-unnessa*, 45 All 316, 21 A L J 176, 71 Ind Cas 631, A I R 1923 All 282.

Where execution proceedings having been started against a judgment debtor, who had died long ago, writs of attachment and proclamation of sale were issued in his name and returns were filed that the processes were duly served upon the judgment-debtor, and thereafter the sale took place, it was held that the application to set aside the sale was within

time if instituted within one month from the date of the applicant's knowledge of the fraud—*Arjun v Gunendra*, 18 C W. N. 1266.

Where every process issued by the Court to apprise the judgment debtors or their representatives that execution was to proceed against them, had been fraudulently suppressed, *held* that this section applied to the case—*Ram Kinkar v Sitthi Ram*, 27 C L J 528, *Jatindra v Brojendra*, 19 C W N 553

Fraud antecedent and subsequent to sale —It is not necessary to prove fraud subsequent to the sale—*Jotindra v Brojendra*, 19 C W N 553 It is not necessary to prove that *after* the sale when the right to apply for setting aside the sale accrued, there was some fraud practised by the decree-holder which kept his right to apply concealed from him It is sufficient if fraud antecedent to the sale is proved Therefore, if owing to the fraudulent suppression of the processes by the decree holder, all knowledge of the execution proceedings up to the date of the sale was withheld from the petitioner, then so long as he did not come to know of the sale, the effect of the fraud continued and the conclusion is that he was kept from the knowledge of the sale in consequence of the initial fraud practised by the decree holder—*Sarva Begam v Ramchandra*, 47 All 850, 23 A L J. 760, A I R 1925 All 778 88 Ind Cas 500 *Nabin Chandra v Bipin Chandra*, 87 Ind Cas 555, A I R 1926 Cal 229 But fraud antecedent to the sale cannot be excluded from consideration It was a saying of an old Chancellor that frost and fraud end in foul, and in this lies the truth of the matter Fraud is a continuing influence and until that influence ends, it retains its power of mischief—per Jenkins C J in *Narayan v Mohanb Narayan*, 16 C W N 894 (dissenting from *Purna Chandra v Anukul*, 36 Cal 654). *Bayrang v Sonjhar*, 6 P L T 567, A I R 1925 Pat 521 The question of fraud should be considered as a whole Where the judgment-debtor alleged fraud on the part of the decree holder both before and after the sale, and the lower Court refused to consider the question of fraud antecedent to the sale, the High Court held that the proof of fraud antecedent to the sale may have an important bearing on the determination of the question whether there was fraud subsequent to the sale, although it cannot be laid down as an inflexible rule that proof of fraud antecedent to the sale necessarily indicates continuance of that fraud up to a period subsequent to the sale—*Tookoomani v Dwarka*, 17 C W N 478, 17 Ind Cas 972

173. *Necessary document* —In one sense every document may be said to be necessary, but a limit should be placed on the meaning of the term, and a document which is merely useful in evidence cannot be considered a necessary document—*Lakshminarasu v Ankim*, 7 M H C R. 22 (24).

Concealment of document —The fact that a document which is alleged to have been fraudulently concealed has been registered would seem to

displace the allegation of concealment—*Venkaleswara v. Shekhari*, 3 Mad. 384 (398) P. C.. So too does the production of the document before a public officer or in a Court in support of a claim—*Ibid* (at p. 399), *Ghisa v. Hayat*, 120 P. R. 1883.

174. When the fraud became known.—To bring his case within this section the plaintiff must allege when the fraud pleaded came to his knowledge—*Kan. Radha Krishna v. Bisheshwar*, 1 Pat. 733 (P. C.), 67 Ind. Cas. 914 A. I. R. 1922 P. C. 336. When the true nature of his rights was not discovered by the plaintiff earlier than the time at which his demand for possession was resisted, limitation began to run from the date of resistance—*Harnath v. Indar Bahadur*, 56 O. C. 223 (P. C.), 27 C. W. N. 949, 71 Ind. Cas. 623, A. I. R. 1922 P. C. 403.

The knowledge required by this section is not mere suspicion. It must be knowledge of such a character as will enable the person defrauded to seek his remedy in Court—*Natha v. Jodha*, 6 All. 406. Such knowledge must be a clear and definite knowledge of the facts constituting the particular fraud. The mere fact that some hints and clues reached the injured party which perhaps, if vigorously and acutely followed up, might have led to a complete knowledge of the fraud is not enough to constitute clear and definite knowledge of it—*Rahimbhoy v. Turner*, 17 Bom. 341 (P. C.); *Biswan Chandra v. Promotha*, 49 Cal. 886, 36 C. L. J. 295, *Ramchandra v. Hardro*, 20 N. L. R. 23.

In any particular case, the Court having regard to the nature of the fraud, the facility with which it may be known, and the likelihood of the attention being called to it, may infer such knowledge and may infer the time when the means of knowledge first came within the plaintiff's reach, or in other words, may hold the plaintiff fixed with constructive knowledge of the fraud—*Nilmoni v. Nilu Naik*, 20 Cal. 425.

174A. Protection of bona fide purchaser.—Before a person can obtain the benefit of this section he must show (1) that he is a purchaser according to the proper meaning of the term, (2) that he is a purchaser *bona fide* and (3) that he is a purchaser for valuable consideration—*Radhanath v. Gisborne*, 15 W. R. 24, at p. 27 (P. C.).

175. Application of section to special or local laws.—Under section 29 as now amended, this section will be applied in computing the period of limitation prescribed by any special or local law. The decision in *Radha Shyam v. Dinabandhu*, 18 C. W. N. 31 to the effect that section 18 of the Limitation Act has no application to a proceeding under the Bengal Tenancy Act, is no longer good law.

19. (1) Where before the expiration of the period prescribed

Effect of acknowledgment in writing	for a suit or application in respect of any property or right, an acknowledgment of
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liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by some person through whom he derives title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed

(2) Where the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed, but, subject to the provisions of the Indian Evidence Act, 1872, oral evidence of its contents shall not be received

Explanation I—If for the purposes of this section an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right or avers that the time for payment delivery performance or enjoyment has not yet come, or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to a set-off or is addressed to a person other than the person entitled to the property or right

Explanation II—If for the purposes of this section, 'signed' means signed either personally or by an agent duly authorized in this behalf

Explanation III—If for the purposes of this section an application for the execution of a decree or order is an application in respect of a right.

176 Before expiration of period—The acknowledgment must be made before the expiration of the period. An acknowledgment of a barred debt cannot give a fresh start of limitation in favour of the creditor—*Bindal v Chola*, 10 C W N 636, *Mutsaddi Lal v B B & C I. Ry*, 42 All 390, *Suraj Prasad v Bourke*, 5 P L J 371

Where a series of acknowledgments have been made, each within the new period arising from the previous acknowledgment, and the first is within three years of the date of the debt, the debt is kept alive—*Mohesh Lal v Bhumika Kmarce*, 6 Cal 340

An acknowledgment of liability under the decree made and signed by the judgment-debtor more than three years after the first default could not save limitation—*Shib v Kalka*, 2 All 443

An acknowledgment made during holidays but after the expiry of the period of limitation prescribed for the suit will not start a new period under this section as the acknowledgment was made after the expiry of the period, and the fact that the right to sue was subsisting under section

4 on the date of the acknowledgment owing to the intervention of the vacation will be of no avail. The word prescribed means prescribed by the schedule and not prescribed by the operation of sec 4—*Bai Hembo v Masamati*, 1 Bom 182. *Nardram v Ranchhodas* 19 N L R 135, 5 N L J 118. A I R 1922 Nag 250.

But a mortgage is kept alive by an acknowledgment embodied in a subsequent mortgage-deed executed within the period of grace allowed by section 31—*Moti Begam v Har Prasad* 11 A L J 570.

This section covers cases where the cause of action for recovery of the original debt is still subsisting. It does not cover cases where the old debt is extinguished and a new contract is entered into instead—*Tara v Bhoolon* 23 W R 462. Such a contract is governed by sec 25 of the Indian Contract Act—*Billings v Uncovenanted Service Bank* 3 All 181. Thus a suit on a bond executed for the balance due on a previous bond for which the period of limitation had expired at the time of executing the new bond, may be brought by virtue of sec 25 of the Contract Act, although the second bond may be ineffectual as an acknowledgment under this section—*Raghoji v Abdal*, 1 Bom 590. Similarly, a suit may be brought on a promissory note given in consideration of a time barred debt, section 25 of the Contract Act recognising the right to bring such an action—*Chatur v Tulsi*, 2 Bom 230.

177 Acknowledgment—Acknowledgment means a definite admission of liability. It is not necessary that there should be a promise to pay, the simple admission of a debt is sufficient—*Binode Behari v Raj Narain*, 30 Cal 699. *Subramania v Veerabhadra* 41 M L J 217, *Peri Ramasami v Chandra Kalayya* 48 Mad 693. 47 M L J 840, *Ibrahim v Lalit Mohan*, 50 Cal 974 (975) 28 C W N 322. *Nand Lal v Parlab Singh*, 3 Lah 326, A I R 1922 Lah 425. In this respect the Indian law differs from the English law. In England, the acknowledgment must be such admission of liability that a promise to pay may be inferred from it so that the requirements of English law are more stringent than those of Indian law. See *Maniram v Seth Rupchand*, 33 Cal 1047 (P C) at p 1060. Where the right claimed is a debt, it is necessary that an unequivocal and unqualified admission of the debt or of the subsisting relationship of debtor and creditor should be established, though a promise to pay need not be made out—*Benode v Rajnarain*, 30 Cal 699.

In case of an acknowledgment of a barred debt, which amounts to the creation of a new contract under sec 25 of the Contract Act there must be an express promise to pay, otherwise the acknowledgment is insufficient to create a contract—*Ram Bahadur v Damodar*, 6 P L J 121.

If a debt is time barred, there can be no acknowledgment of the debt, there can only be a promise to pay that sum. Such a promise to pay would amount to a new contract. It is open to the borrower to make a promise in writing, signed by himself, to pay a debt of which his

Where the admission was in the following terms: "I am ashamed that the account has stood so long" it was held to be a good acknowledgment—*Cornforth v Smihard* (1859) 5 H & N 13; *Holmes v Mackrell*, (1858) 3 C B (N S) 789. Where the defendant (i.e. the debtor) himself first wrote to the plaintiff requesting him to send in his account made up to Christmas last and not having received any reply to his first note, he wrote the plaintiff again requesting him to send in his account, it was held that there was a sufficient admission of a debt—*Quincey v Sharpe*, (1875) 1 Ex D 72.

A letter written by a railway company to the plaintiff informing the latter that the goods have been rightly delivered to a third person under an indemnity bond and that the plaintiff's claim cannot be entertained is not an acknowledgment of liability but on the contrary amounts to a denial of liability—*Ludhmal v Secretary of State*, 13 S L R 1. An allegation that a debt has been discharged is not an acknowledgment because it is tantamount to a denial of the debt—*Rangasami v Thangavelu*, 42 Mad 637 10 L W 333, 50 Ind Cas 380. Where there was an acknowledgment that there was a mortgage, and there was no express statement that it was discharged but there was a statement that in order to pay off the debt a sale was effected and that since the date of sale the vendees had been in possession of the property, held that the statement did not constitute an acknowledgment of liability—*Chhajerdhari v Nasib Singh*, 5 P L T 151 78 Ind Cas 919 A I R 1924 Pat 806.

Where a person admitted in a previous case that he had received Rs 1000 as earnest money but stated that the sum had been more than repaid by delivery of cotton to the value of Rs 3000, such a statement cannot be construed into an admission of a subsisting liability in respect of Rs 1000—*Kalu v Mehru*, 41 P R 1916. But where a debtor wrote a letter to the creditor enclosing a memorandum of account which showed that out of the amount of Rs 1654 due to the creditor, the debtor had deducted the sum of Rs 1,498 being a sum due to the debtor from a firm of which the creditor was the manager, and remitted to the creditor Rs 156 being the balance due held that the mere fact that the debtor stated in the account that he had on that day appropriated a part of the amount due to the creditor in satisfaction of a claim due from a third party did not alter the fact that on the date of the letter the sum of Rs 1,654 was due from the debtor to the creditor before the alleged appropriation was made, there was therefore an acknowledgment of the whole sum of Rs 1654—*Curlender v. Abdul Hamid*, 43 All 216 (219).

The acknowledgment of liability must be an absolutely unconditional one. A letter tantamount to a statement that the writer would see whether any amount was due is not an acknowledgment sufficient to give a fresh start—*Jogeshwar v. Rajnarain*, 31 Cal. 195. A letter saying that the writer will sign after looking into the accounts is no acknowledgment—

Bhairi v Gajadhar 19 C W N 170 But where the defendant denied that any balance would be due to the plaintiff but admitted that accounts should be taken and that he would be liable if any balance were found due to the plaintiff it was held that the defendant had made an acknowledgment of the debt—*Sitayya v Rangareddi* 10 Mad 259 Similarly, where the defendants admitted the existence of a running account between the parties and went on to say that his representatives would compare accounts and pay what was found to be due held that the words were a clear admission of liability—*Sant Lal v Beni Prasad* 23 A L J 248, 87 Ind Cas 985 A I R. 1925 All 340

Where the parties to an *abichalnama* acknowledged that accounts remained unadjusted which the arbitrators had to adjust, and each party agreed that he would pay such amount as might be found due from him on adjustment of accounts, it was held that there was sufficient acknowledgment—*Janardan v Radhaballabh*, 23 C W N 921

Even if the acknowledgment be a conditional one, the condition must be fulfilled in order that such acknowledgment should save limitation—*Maniram v Seth Rup Chand*, 33 Cal 1047 at p 1058 (P C). *Arunachella v Rangiah Appa*, 29 Mad 519 The defendant wrote a letter to the effect that if certain arbitrators should decide that the defendant should pay any amount, he would immediately pay The arbitrators failed It was held that the letter would not operate as an acknowledgment—*Ramanurthy v Gopayya*, 40 Mad 701, *Narayanasaami v Gangadhara*, 37 M L J 353

An acknowledgment of liability need not be express, it may be by implication—*Arur Singh v Partab*, 131 P R 1919, *Subba Rao v Parasurama* 34 M L J 551 *Bhagwan v Madhav*, 46 Bom 1000, 24 Bom L R 713, but the implication must be a necessary implication, so that the acknowledgment is clear and unequivocal—*Bibi Sahib v Sayad Mir Mohamad* 9 S L R 143, *Filip & Co v Mahomedali*, 13 S L R 183, *Ralliram v Budhuram*, 79 Ind Cas 914 (Sind) Where a judgment-debtor in an execution proceeding objected to his being arrested because he was a poor man and asked that the warrant of arrest should not be executed until his objection had been decided, held that there was no acknowledgment of a debt within the meaning of this section but a mere objection to the execution of the decree in the manner sought by the decree holder An acknowledgment must be a clear one and not be left to sheer inference—*Lachman Das v Ahmad Hassan*, 39 All 357

But a petition by the arrested judgment-debtor praying for release and for an order to pay the balance of the decretal amount is an acknowledgment of the judgment-debt—*Vishal v Gopal*, 5 N L R 8

Where the defendant stated that for the last five years he had open and current account with the plaintiff's predecessor, the legal consequence would be that either of the parties had a right against the other to an

Where the admission was in the following terms I am ashamed that the account has stood so long it was held to be a good acknowledgment—*Cornforth v Smithard* (1859) 5 H & N 13 *Holmes v Mackrell* (1858) 3 C B (N S) 789 Where the defendant (i.e. the debtor) himself first wrote to the plaintiff requesting him to send in his account made up to Christmas last and not having received any reply to his first note he wrote the plaintiff again requesting him to send in his account it was held that there was a sufficient admission of a debt—*Quincey v Sharpe*, (1875) 1 Ex D 72

A letter written by a railway company to the plaintiff informing the latter that the goods have been rightly delivered to a third person under an indemnity bond and that the plaintiff's claim cannot be entertained is not an acknowledgment of liability but on the contrary amounts to a denial of liability—*Ludhmal v Secretary of State* 13 S L R 1 An allegation that a debt has been discharged is not an acknowledgment because it is tantamount to a denial of the debt—*Rangasami v Thangavelu* 42 Mad 637 10 L W 333 50 Ind Cas 380 Where there was an acknowledgment that there was a mortgage and there was no express statement that it was discharged but there was a statement that in order to pay off the debt a sale was effected and that since the date of sale the vendees had been in possession of the property held that the statement did not constitute an acknowledgment of liability—*Chhaterdhari v Nasib Singh* 5 P L T 351 28 Ind Cas 919 A I R 1924 Pat 806

Where a person admitted in a previous case that he had received Rs 1 000 as earnest money but stated that the sum had been more than repaid by delivery of cotton to the value of Rs 3 000 such a statement cannot be construed into an admission of a subsisting liability in respect of Rs 1 000—*Kalu v Mehru* 41 P R 1916 But where a debtor wrote a letter to the creditor enclosing a memorandum of account which showed that out of the amount of Rs 1 654 due to the creditor the debtor had deducted the sum of Rs 1 498 being a sum due to the debtor from a firm of which the creditor was the manager and remitted to the creditor Rs 156 being the balance due held that the mere fact that the debtor stated in the account that he had on that day appropriated a part of the amount due to the creditor in satisfaction of a claim due from a third party did not alter the fact that on the date of the letter the sum of Rs 1 654 was due from the debtor to the creditor before the alleged appropriation was made there was therefore an acknowledgment of the whole sum of Rs 1654—*Curlender v Abdul Hamid* 43 All 216 (219)

The acknowledgment of liability must be an absolutely unconditional one A letter tantamount to a statement that the writer would see whether any amount was due is not an acknowledgment sufficient to give a fresh start—*Jogeshwar v Rajnarain*, 31 Cal 195 A letter saying that the writer will sign after looking into the accounts is no acknowledgment—

Bhairo v Gajadhar 19 C W N 120 But where the defendant denied that any balance would be due to the plaintiff but admitted that accounts should be taken and that he would be liable if any balance were found due to the plaintiff it was held that the defendant had made an acknowledgment of the debt—*Sitayya v Rangareddi* 10 Mad 259 Similarly where the defendants admitted the existence of a running account between the parties and went on to say that his representatives would compare accounts and pay what was found to be due held that the words were a clear admission of liability—*Sant Lal v Beni Prasad* 23 A L J 248 87 Ind Cas 985 A I R. 1925 All 340

Where the parties to an *abakalnama* acknowledged that accounts remained unadjusted which the arbitrators had to adjust and each party agreed that he would pay such amount as might be found due from him on adjustment of accounts it was held that there was sufficient acknowledgment—*Janardan v Radhaballabh* 23 C W N 921

Even if the acknowledgment be a conditional one the condition must be fulfilled in order that such acknowledgment should save limitation—*Maniram v Seth Rup Chand* 33 Cal 1047 at p 1058 (P C) *Arunachella v Rangiah Appa* 29 Mad 519 The defendant wrote a letter to the effect that if certain arbitrators should decide that the defendant should pay any amount he would immediately pay The arbitrators failed It was held that the letter would not operate as an acknowledgment—*Ramanurthy v Gopayya* 40 Mad 701 *Varayanasami v Gangadhara* 37 M L J 353

An acknowledgment of liability need not be express it may be by implication—*Arur Singh v Partab* 131 P R 1919 *Subba Rao v Parasurana* 34 M L J 551 *Bhagwan v Madhav* 46 Bom 1000 24 Bom L R 714 but the implication must be a necessary implication so that the acknowledgment is clear and unequivocal—*Bibi Sahib v Sayad Mir Mohamad* 9 S L R 143 *Filip & Co v Mahomedali* 13 S L R 183 *Rallirani v Budhram* 79 Ind Cas 914 (Sind) Where a judgment debtor in an execution proceeding objected to his being arrested because he was a poor man and asked that the warrant of arrest should not be executed until his objection had been decided held that there was no acknowledgment of a debt within the meaning of this section but a mere objection to the execution of the decree in the manner sought by the decree holder An acknowledgment must be a clear one and not be left to sheer inference—*Lachman Das v Ahmad Hassan* 39 All 357

But a petition by the arrested judgment debtor praying for release and for an order to pay the balance of the decretal amount is an acknowledgment of the judgment-debt—*Vithal v Gopal* 5 N L R 8

Where the defendant stated that for the last five years he had open and current account with the plaintiff's predecessor the legal consequence would be that either of the parties had a right against the other to an

Where the admission was in the following terms I am ashamed that the account has stood so long it was held to be a good acknowledgment—*Cornforth v Smithard* (1859) 5 H & N 13 *Holmes v Mackrell* (1858) 3 C B (N S) 789 Where the defendant (i.e. the debtor) himself first wrote to the plaintiff requesting him to send in his account made up to Christmas last and not having received any reply to his first note he wrote the plaintiff again requesting him to send in his account it was held that there was a sufficient admission of a debt—*Quincey v Sharpe* (1875) 1 Ex D 72

A letter written by a railway company to the plaintiff informing the latter that the goods have been rightly delivered to a third person under an indemnity bond and that the plaintiff's claim cannot be entertained is not an acknowledgment of liability but on the contrary amounts to a denial of liability—*Ludhmal v Secretary of State* 13 S L R 1 An allegation that a debt has been discharged is not an acknowledgment because it is tantamount to a denial of the debt—*Rangasani v Thagavelu* 42 Mad 637 10 L W 333 50 Ind Cas 380 Where there was an acknowledgment that there was a mortgage and there was no express statement that it was discharged but there was a statement that in order to pay off the debt a sale was effected and that since the date of sale the vendees had been in possession of the property held that the statement did not constitute an acknowledgment of liability—*Chhaterdhari v Nasib Singh* 5 P L T 551 78 Ind Cas 919 A I R 1924 Pat 806

Where a person admitted in a previous case that he had received Rs 1000 as earnest money but stated that the sum had been more than repaid by delivery of cotton to the value of Rs 3000 such a statement cannot be construed into an admission of a subsisting liability in respect of Rs 1000—*Kalu v Mehru* 41 P R 1916 But where a debtor wrote a letter to the creditor enclosing a memorandum of account which showed that out of the amount of Rs 1654 due to the creditor the debtor had deducted the sum of Rs 1498 being a sum due to the debtor from a firm of which the creditor was the manager and remitted to the creditor Rs 156 being the balance due held that the mere fact that the debtor stated in the account that he had on that day appropriated a part of the amount due to the creditor in satisfaction of a claim due from a third party did not alter the fact that on the date of the letter the sum of Rs 1654 was due from the debtor to the creditor before the alleged appropriation was made there was therefore an acknowledgment of the whole sum of Rs 1654—*Curlender v Abdul Hamid* 43 All 216 (219)

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Bhaino v Gajadhar 19 C W N 170 But where the defendant denied that any balance would be due to the plaintiff but admitted that accounts should be taken and that he would be liable if any balance were found due to the plaintiff it was held that the defendant had made an acknowledgment of the debt—*Sitayya v Rangareddi* 10 Mad 259 Similarly where the defendants admitted the existence of a running account between the parties and went on to say that his representatives would compare accounts and pay what was found to be due held that the words were a clear admission of liability—*Sant Lal v Beni Prasad* 23 A L J 248 87 Ind Cas 983 A I R 1925 All 340

Where the parties to an *abichalna* acknowledged that accounts remained unadjusted which the arbitrators had to adjust and each party agreed that he would pay such amount as might be found due from him on adjustment of accounts it was held that there was sufficient acknowledgment—*Janardan v Radhaballabh* 23 C W N 921

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But a petition by the arrested judgment debtor praying for release and for an order to pay the balance of the decretal amount is an acknowledgment of the judgment debt—*Vithal v Gopal* 5 N L R 8

Where the defendant stated that for the last five years he had open and current account with the plaintiff's predecessor the legal consequence would be that either of the parties had a right against the other to an

account; it followed equally that whoever on the account should be shown to be the debtor to the other was bound to pay his debt to the other, and the inevitable deduction from the admission is that the defendant acknowledged his liability to pay his debt to the plaintiff, if the balance should be ascertained to be against him—*Maniram Seth v. Seth Rup Chand*, 33 Cal 1047 (1057) P C Where the principal sum advanced on a mortgage bond was Rs 5,700, and on payment of Rs 1,751 by the mortgagor an endorsement was made by him on the back of the bond in the following terms "Paid on account of principal as per separate accounts, Rs. 1,751 only," held that the endorsement was a sufficient acknowledgment under this section Although it did not specify the principal sum due at the time of the endorsement, still the expression 'the principal' must be taken to refer to the principal mentioned in the bond on the back whereof the endorsement was made—*Prasanna v Niranjan*, 48 Cal 1046, 26 C W N. 213, 64 Ind Cas 988 In order to make a binding acknowledgment it is not necessary that the exact sum due should be stated in the acknowledgment, it being sufficient if some debt be acknowledged due—*Colledge v. Horn*, (1825) 3 Bing 119, *Lachmere v Fletcher*, (1833) 1 C & M 623

An acknowledgment of liability would be a good acknowledgment, even if it is accompanied with a demand of evidence of title Thus, the tenants wrote to the landlord's attorney "As we have informed your client, we are quite willing to pay him the rent due under our *mourasi pattah* if he can shew a title to give us a good receipt for it that will satisfy our lawyers If he is in the same position that his father was, up to the time of his death, and unable to produce a perfect title, we are still willing to pay him the rent on his giving us a substantial indemnity similar to that which we had from his father " It was held to be a sufficient acknowledgment of the tenants' liability to pay rent—*Rungo Lal v Wilson*, 26 Cal 204

Again, the acknowledgment must distinctly and definitely relate to the liability in respect of the right claimed—*Benimadhub v. Birbal*, 21 O C 151, it must be a necessary implication from the words used that the person acknowledging was referring to the distinct liability in dispute, and not any liability—*Hingu v Heramba*, 13 C. L. J. 139, *Ellip & Co v. Mahomedali*, 13 S. L R. 183; *Gopal Rao v. Harilal*, 9 Bom. L R 715, *Bhagwan v Madhav*, 24 Bom L R. 713, A. I R. 1922 Bom. 356 A letter sent by the defendant to the plaintiff was as follows—"I was bound to send Rs. 30 according to my *vaida* (fixed time) but on account of the death of my father I have not been able to fulfil my promise. But now, on his obsequies being over, I will positively pay Rs 30 As to whatever debts may be due by my old man, I am bound to pay the same so long as there is life in me. This is, indeed, my earnest wish After this, God's will be done. Therefore I will positively pay Rs 30 " It was held that the letter merely contained the personal promise of the writer to pay Rs. 30 and a general admission that he was liable to pay his father's debt,

but it did not acknowledge the existence of any particular debt due to the plaintiff from the defendant's deceased father—*Madhairao v Gulabhai*, 23 Bom 177 If more than one debt be due to the creditor at the time, the acknowledgment must be such as to identify the particular debt sued on, for oral evidence will not be admissible to establish the identity of the debt—*Beh Maharani v Collector*, 17 All 198 (P C)

It is not necessary that the creditor should openly assent to an amount acknowledged by his debtor to be due to him, it is sufficient if he relies upon it in the suit he brings, and if between the date of acknowledgment and the time of bringing the suit, the creditor has allowed the acknowledgment to remain uncontradicted and unexplained by his debtor—*Lalji v Roghoonundun*, 6 Cal 447 (452)

It is not required that an acknowledgment should specify every legal consequence of the thing acknowledged. A simple acknowledgment by one of two joint-debtors that the original debt was a joint debt is sufficient to keep alive the right of the other to claim contribution—*Sukhamoni v. Ishan Chunder*, 25 Cal 844 (P C) The plaintiff shipped 200 cases of oil on the defendant's steamship from Bombay to Jeddah. On the arrival of the steamship at Jeddah, 35 of the cases were missing and were short delivered. The agents of the defendant company at Jeddah granted a certificate that the 35 cases had been short delivered. Held that the certificate of short delivery amounted to an acknowledgment of liability in respect of the goods short delivered. The certificate contained a clear acknowledgment that 35 cases had been short delivered meaning that the 35 cases which ought to have been delivered had not been delivered. From that followed the legal incident of the defendant's position to pay compensation in respect of non-delivery—*Haji Ajam v Bombay & Persia S N Co*, 26 Bom 562 (569)

178 Acknowledgment, to whom to be made.—It is not necessary that the acknowledgment of liability must be made to the person who is entitled to the right in respect of which the liability arises, or to any one through whom he claims. An acknowledgment, to whomsoever made, is a valid acknowledgment if it points with reasonable certainty to the liability under dispute—*Guru Charan v Surendra*, 19 C W N 263, *Bhagwan v Madhav*, 24 Bom L R 713 46 Bom 1000 *Venkata Krishniah v Subbarajudu*, 40 Mad 698 *Abdul v Von Goldstein* 43 P R 1910, *Tanner v Smart*, (1827) 6 B & C 603 *Halliday v Ward*, (1811) 3 Camp 32, *Moodie v Bannister*, (1859) 4 Drew 432 See Explanation I

It has been held in a Calcutta case that an acknowledgment to be operative must be made to the creditor or to a person through whom he claims or at least must be addressed to some person, though not necessarily the person entitled to the right. Therefore the recital of a debt in a conveyance, which was not addressed to any person nor was communicated to the creditors or any body on their behalf, could not be treated

as an acknowledgment sufficient to same limitation—*Inam Ali v Baij Nath*, 33 Cal 613, following *Mylapore v Yeo Kay*, 14 Cal 801 (P. C). Similarly it was held in a Bombay case that an entry in the debtor's book of account was not an acknowledgment because it was not communicated or addressed to the creditor or some person—*Mahalakshmi Bai v. Nageswar*, 10 Bom 71. But the authority of these rulings has been shaken by the Privy Council decision in *Mamram Seth v Seth Rupchand*, 33 Cal 1047 (P. C) in which the acknowledgment was not addressed to the creditor or to any person but was contained in a petition for probate, and by another decision of the same high tribunal in *Hiralal v. Narsilal*, 37 Bom 326 P. C (cited below) in which the acknowledgment was contained in a certain book of the Government Agent. See 45 Bom 934 at page 943. In fact it will be evident from the undernoted cases that an acknowledgment is not required to be addressed to any person, much less to the creditor or some person through whom he claims.

Thus, a deposition given and signed by a party as a witness in a suit is a sufficient acknowledgment in writing under sec 19—*Venkata v Parthasaradhi*, 16 Mad 220. *Petta Venkan v Subramantan*, 20 Mad 239. *Megharaj v Mathura*, 35 All 437. *Subramania v Veerabhadra*, 41 M. L. J 217. So also, a written statement in a former suit and containing a distinct acknowledgment of a mortgage or debt or right will give a fresh starting point of limitation—*Balmolaud v Ramu Lal*, 20 P. R 1887. *Jeba v Chaman*, 16 P. R 1891. *Shrinivas v Varhar*, 32 Bom 296. *Venkataratnam v Ramaraju*, 24 Mad 361. *Kadri Fakirappa v Monki Husan* 19 M. I. J 650. *Official Assignee v Subramania*, 46 M. L. J 1; *Indar Pal v Mewa Singh*, 36 All, 264. *Ganga Sahai v Khazan Chand*, 1 Lah 357. *Ram tular v Beni Singh*, 25 O. C. 89 10 O. L. J 7.

A statement contained in a plaint in a case filed by the grandfather of the mortgagee to the effect that the property is mortgaged to him is an acknowledgment of liability in respect of the mortgagor's right to redeem—*Hari Chand v Phiraya*, 1911 P. W. R. 82. So also, where in a suit for redemption of a mortgage the plaintiff, who was the purchaser of a portion of the mortgaged property, stated in his plaint that there were other persons interested in the redemption of the property who had not joined in the suit, and that therefore he was seeking to redeem the entire mortgage making the other persons as *pro forma* defendants, held that this statement amounted to an acknowledgment of the right of the other co-mortgagors to redeem—*Baleshar v. Ram Dto*, 36 All 408.

A statement contained in a *Kobala* that a certain mortgage on some of the properties comprised in the *Kobala* is still subsisting has the effect of an acknowledgment so as to create a new period of limitation—*Ankur v. Ram Chandra*, 91 Ind. Cas 461, A. I. R. 1926 Cal. 693.

An entry in the *kaizab ul-azra* in which the mortgagee stated the amount of the mortgage and the names of the parties, is an acknowledgment in

respect of the mortgagor's right to redeem—*Kamla Devi v. Gurdayal*, 17 A. L. J. 330. Where a certain *desaigari dastur* having been mortgaged on the 4th November 1793 the mortgagees procured the entry of their names in the Collector's books as mortgagees, and on 8th June 1843, an entry of payment to the mortgagees of their respective shares of the allowance was made in the books of the Government Agent entrusted with the payment thereof, and the mortgagees signed their names against it acknowledging receipt of their shares *held* that a new period of limitation started from the date of the acknowledgment and a suit for redemption brought in 1901 was in time—*Hiralal v. Narisul*, 37 Bom. 326 (P. C.). Certain lands were mortgaged with possession in 1826. Government issued sanads to the holders of the lands in 1865 and 1876. These sanads were entered in a register where the mortgagee was described as holding the lands as mortgagee. These entries were signed by the mortgagee. On the death of the mortgagee a similar sanad was granted to his widow in 1882 and was similarly entered in the register and signed by the widow. The mortgagor having sued for redemption in 1917, *held* that the registers having the signatures of the mortgagee and his widow were acknowledgments of the mortgagee's liability to be redeemed by the mortgagor and consequently the suit was not barred—*Pranivan Das v. Bai Mani*, 45 Bom. 934 (dissenting from *Imam Ali v. Baijnath*, 33 Cal. 613).

If an insolvent writes down a debt in his schedule as owing the debt to a named person and signs the schedule, that is a sufficient acknowledgment under this section—*Shrigopal v. Dhanalal*, 35 Bom. 383, *Rampal v. Nand Lal*, 16 C. W. N. 346.

In a suit to redeem a kanom the plaintiff set up in bar of limitation an acknowledgment contained in the will of the deceased mortgagee who thereby devised to his son lands therein described as held by him on kanom. The mortgagor's name was not mentioned nor the date of the kanom, nor was there any further description of the land, which, however, was admitted to be the land in question in the suit. It was held that the will constituted an acknowledgment under this section notwithstanding the absence of the name of the mortgagor and the date of the mortgage—*Uppi v. Mammavan*, 16 Mad. 366.

Where the defendants attested as correct the record of rights prepared at a settlement with them of an estate in which they were described as mortgagees, but which did not mention the name of the mortgagor, it was held that there was an acknowledgment of the mortgagor's right to redeem under article 148—*Dasa Chand v. Sarfraz*, 1 All. 117.

Where a mortgagee sold his right in the mortgaged property, and in the deed he stated that he was holding the property as a mortgagee under a mortgage-deed dated 11th June 1849, *held* that the statement in the sale-deed was an acknowledgment which extended the time for the purpose of redemption—*Har Narayan v. Shro Prasad*, 11 A. L. J. 86.

Under the English law, an acknowledgment to a stranger is inoperative—*Stamford v Smith*, [1892] 1 Q B 765 *Rogers v Quinn*, 26 L R Ir 136.

179 Other instances of acknowledgment—Where the creditor granted an extension of time on the written application of the debtor praying for extension the written application amounted to an acknowledgment—*Sugappa v Gobindappa* 12 M L J 351

Though a letter written by the defendant to the plaintiff contained no mention of the sum due or any promise to pay, still the combined effect of a letter written by the plaintiff demanding payment and the letter written by the defendant in reply thereto was held to be an acknowledgment sufficient to save limitation—*Harrison v Hope*, 9 B L R App 43

A mortgagor subsequent to his mortgage executed two promissory notes in favour of the mortgagee in one of these notes he referred to the mortgage-debt thus the amount due under the mortgage-deed is set apart in another he wrote besides this, the mortgage-debt is distinct These notes would be sufficient acknowledgment of the mortgage—*Dinkar v Chhaganlal* 38 Bom 177

An acknowledgment which is valid in other respects cannot be inoperative simply because it assigns a wrong date to the debt Where in a previous suit for ejectment the defendant alleged that he was in possession as usufructuary mortgage under a specific mortgage of 1842, it was held that in a suit for redemption the above statement amounted to an acknowledgment although it was found that the mortgage was that of a date earlier than 1842—*Dip Singh v Girand* 26 All 313 See also *Har Narain v Sheo Prasad* 11 A L J 86

In a suit upon a joint and several bond brought against the defendant as a principal debtor an acknowledgment of liability made by him as surety only is sufficient to save limitation—*Uncovenanted Service Bank v Grant*, 10 All 93

A *hatchitta* is an acknowledgment within the meaning of this section—*Mahendra Nath v Lalit Mohan*, 46 Cal 746

A *rukhhata* (i.e. account stated, being the totalling up of the items of an account and adding interest and acknowledging their correctness) signed by the debtor and made within the period of limitation implies a promise to pay the debt and can form the basis of a suit—*Chunilal v Laxman*, 46 Bom 24, A I R 1927 Bom 183 23 Bom L R 606

When a person borrows a sum of money and executes a promissory note, he executes it for the consideration received by him, and when it is executed in respect of a consideration already passed, it is an acknowledgment of the liability to pay the amount mentioned in the note Even though the promissory note cannot be enforced for some cause (e.g. as offending against sec 26 of the Paper Currency Act) it can nevertheless be used as evidence of an acknowledgment of liability—*Asavaramayya*

v *Venkataramnam* 50 M L J 36, 92 Ind Cas 626, A I R. 1926 Mad. 452, *Vackimulku v Audtappa* 1917 M W N 778, 6 L W 630.

An endorsement on a promissory note amounts to an acknowledgment of liability for the balance due under the note. Thus, the defendant executed a promissory note on November 12, 1913 for Rs 1,500. Payments were made of Rs 90 in February 1913, Rs 200 in January 1916 and Rs 381 in April 1916. On November 6, 1916 he endorsed on the note the three payments which had been made on the previous dates, added up the total and signed underneath. He'd that the endorsement meant that the promisor recorded that he had paid Rs 671 against the liability under the promissory note and that consequently he admitted his liability to pay the balance. As a matter of common law, an endorsement on a promissory note by the promisor is an acknowledgment of liability which starts a fresh period of limitation from the date on which it was made, and it makes no difference that such endorsement is below an account showing what has already been paid under the promissory note—*Ganesh v Dallalraya*, 47 Bom 632, 25 Bom L R 144, 72 Ind Cas. 249 (following *Venkata Krishnak v Subbrayudu*, 40 Mad 693).

180. Acknowledgment when not valid.—Acknowledgment made by a person under legal disability is not valid. Thus, an acknowledgment given by a minor will be inoperative and cannot give a fresh start of limitation—*Anis ul Reman v Beni Ram*, 59 P R 1901.

The words remittance of £40 to old account were held not necessarily to import that a further sum was due so as to constitute an acknowledgment of a debt—*Shearman v Fleming* 5 B L R 619.

An acknowledgment not coming directly from the debtor himself but merely deduced as an inference from the tenor of a series of letters is not a proper acknowledgment. There must be some principal writing of a particular date (from which the new period of limitation is to run) which can be relied on by itself. A series of letters in none of which there is a definite acknowledgment of the debt is not sufficient—*Rogers v Monition*, 6 B L R 550.

An acknowledgment of a different kind of liability is not sufficient to save limitation. Thus, an admission made by a tenant that he held the land as a *mulgani* (permanent) tenant at a lighter rent is not an acknowledgment entitling the landlord to recover rent from the defendant as a *chalgani* tenant (tenant from year to year)—*Venkataramana v Srinivasa*, 6 Mad 182.

The acceptance of a sale-certificate by the purchaser of a mortgagee's interest in land, sold in satisfaction of a decree against him, is not an acknowledgment by the purchaser of the title of the mortgagor, so as to give him a fresh starting point for a new period within which he can redeem—*Raman v Krishna* 6 Mad 325 (327).

Where the defendants in the present partition suit in a w^r

statement filed by them in a previous suit the following statement, viz. "proper parties have not been joined in this suit, since A and S left a sister B who died after them. It is necessary to join her heirs in the suit," it was held that the above words were not an admission that B's heirs had a share in the estate, and did not amount to an acknowledgment of liability—*Bibi Sahib v Syed Mir Mahammad* 9 S L R 143

An acknowledgment of liability contained in a communication made to a public officer in official confidence cannot be relied upon, since that communication is inadmissible in evidence under the provisions of sec 124 Evidence Act. Thus, in a suit on a mortgage bond, the mortgagee cannot rely upon a letter written by the mortgagor to the Collector, in which the mortgagor had mentioned the mortgage and had stated that he was financially embarrassed and desired the Court of Wards to take charge of his estate. Such a statement is made solely with the purpose of giving information to the Court of Wards on the strength of which the Court of Wards may decide whether or not the estate should be taken over, such a communication made to the Collector in official confidence cannot be made public property and cannot be relied upon by the creditor as an acknowledgment of liability—*Collector v Jamni Prasad*, 44 All. 360 (366), 20 A L J 140

In a suit upon a promissory note, the plaintiff relied upon a written statement filed by the defendant in another suit, as constituting an acknowledgment of liability. The written statement merely called upon the plaintiff to produce the promissory note adverted to in the plaint in that other case. It was held that the written statement was insufficient to establish an acknowledgment of liability in respect of the promissory note which was the foundation of the present claim—*Kapur v Narinjan*, 34 P R 1918

The delivery of a *hundi* and a cheque which are dishonoured on presentation does not amount to an acknowledgment—*Padma Lochan v Girish Chandra*, 46 Cal 168 (170). But where the *hundi* (which was given and dishonoured) was accompanied by a letter of the defendant acknowledging his liability on the *hundi*, held that there was a sufficient acknowledgment of the debt—*Raman v Vairavan*, 7 Mad. 392.

An oral acknowledgment of a debt is not valid. This section requires the acknowledgment to be in writing—*Ghasita v Sultan*, 1911 P. R. 93

181. Signing.—An acknowledgment without signature is no acknowledgment—*Jaggi v. Sri Ram*, 34 All 464. An admission of a debt in a draft will written by the testator in the first line of which his name appeared but which was not signed by him, did not constitute an acknowledgment under this section—*Ramasami v Mullusami*, 15 Mad. 380. Entries in the debtor's account books not signed cannot be treated as an acknowledgment under this section—*Palamappa v. Veerappa*, 34 M. L. J. 41. A deposition made by the defendant in another suit but

either signed by him nor by his authorised agent does not amount to a proper acknowledgment—*Kapur v Varujan*, 1918 P R 34

Signature need not necessarily be by writing one's name. Making his mark by an illiterate debtor is sufficient—*Bheemangowda v Eeranah*, 7 M H C R 355 *Janki v Jaga* 8 Bom 20. Under section 3 (52) of the General Clauses Act. Sign should with reference to a person who is unable to write his name include his mark.

Signature by initials is not valid and an acknowledgment merely bearing initials instead of signature is not proper—*Lakshmanacharyulu v Venkataramanuja* 3 L W 1 A I R 19-6 Mad 827

If there is a particular custom of signing among the class or community to which the defendant belongs and if the defendant signs according to that custom that would be a sufficient signature. For instance, where a certain letter contained certain specified words in the handwriting of the defendant at the top and the bottom and the evidence showed that among the community to which the defendant belonged this was the usual custom of signing letters and informal documents, it was held that the writing of the specified words amounted to signing—*Gangadhar v Shidramapa*, 18 Bom 556. So also, according to the custom and practice of Natukottai Chetties who do not sign their letters at the foot but begin by saying that the letter is from such and such a firm the name so written is a sufficient signature—*Muthia v Kullaya* 1918 M W N 42

Where is a *hatchita* which represented the account between the defendant and the plaintiff the defendant's name was entered at the top of the entries on the debit side which were admittedly written by the defendant and he wrote the words *likhsita ig khode* (written by self) at the bottom of the entries it was held that this was the mode adopted by the debtor of signing the *hatchita*—*Sahasook v Baskanta* 31 Cal 1043

Rajahs Maharajas and great Zemindars often sign without any name. They simply put down the words *Sree* or *Maharaja* or the name of the place (e.g. *Burdwan Nuddia*) such a signature is sufficient. See *Gunees Biswas v Sreegopal*, 8 W R 395

Where an illiterate defendant merely touched a pen and asked another person to write his name, this was held to be a sufficient signature—*Krishnachar v Vadichi*, 6 M L J 209. A balance of account was written by a person at the request of an illiterate debtor in the debtor's name and signed by the writer in his own name it was held to be a sufficient acknowledgment—*Hein Chand v Vohora* 7 Bom 515

It does not matter in what part of the document—at the top or the bottom—the signature is placed provided the signature is introduced into the document with a view to authenticate it—*Mahalakshmisai v Nageswar*, 10 Bom 71 *Mathura v Babu* 1 All 683 (686), *Mohesh Lal v Busunt* 6 Cal 340, *Onkarlal v Raj Mahomed* 17 N L R 109, 65 Ind Cas 273

The name of a firm in the heading of a letter written in the course of business is a sufficient signature—*Uma Shankar v. Gobind*, 46 All 892, 22 A L J 807, A I R 1924 All 855

Where the whole of an account stated (*khata*) was written by the debtor himself with the introduction of his name at the top of the entry, the *khata* was held to be sufficiently signed within the meaning of this section—*Jehisan v. Bhoosar*, 5 Bom 89, *Holmes v. Machrell*, (1858) 3 C B (N S) 789

182. Signing by agent —For the purposes of this section, the writing containing the acknowledgment need not be signed by the debtor himself, it would be sufficient if the signature is that of an authorised agent—*Muthiah v. Kuttayan*, 1918 M W N 42 The person authorised to give the acknowledgment may sign his name or that of his principal—*Onkarlal v. Raj Mahomed*, 17 N L R 209

Where the name of the mortgagor appeared in a document in the handwriting of another person, and there was nothing to show that that person was authorised to sign the name of the mortgagor, the document was held not to be validly signed—*Gokul v. Sahab*, 15 A L J, 121

As to who is an agent duly authorised, see Note No 190 *infra*

183. 'Against whom the right is claimed' —Section 19 does not require that the person making the acknowledgment of liability in respect of any property should have an interest in the property at the time when the acknowledgment is given. It is sufficient if the acknowledgment has been made by the person against whom the right is claimed—*Jugal Kishori v. Fakhruddin*, 29 All 90. In this case the plaintiff brought a suit in 1903 for possession of a house which he purchased at an execution sale in 1890, and in order to save limitation he relied on an admission made by the defendant in a suit for pre-emption brought by the latter against the plaintiff in 1892. In that suit the defendant admitted that the plaintiff purchased the house at an execution sale. The Lower Court held that the admission was insufficient to save limitation, because the defendant when he made the admission had no interest in the property, his father being then alive. The High Court held that under section 19 the question does not arise as to whether the defendant had any interest in the house when he made the admission, all that the section requires is that an admission was made by the person against whom the right is claimed, and that is sufficient to save limitation.

184. Unstamped acknowledgment —It was held that though an unstamped balance of an account requiring to be stamped under Art 1 of the Stamp Act could not be 'acted upon' as an acknowledgment of a particular sum due, still it might be used for the collateral purpose of showing a liability in respect of transactions between the parties so as to give a new period of limitation—*Fatehchand v. Kisan*, 18 Bom. 614, but in the Full Bench case of *Mulji v. Linga*, 21 Bom. 201, the contrary

view was taken and it was held that an unstamped acknowledgment could not be given in evidence for any purpose including the purpose of saving limitation. The same view is taken in *Galstaur v Hutchinson*, 39 Cal 789, 16 C W N 945 and *Nagappa v V A & R Firm*, 49 M L J 306 A I R 1925 Mad 1215.

185 Unregistered acknowledgment.—Though a compulsorily registrable but unregistered document relating to land is inadmissible in evidence in respect of any question as to the land covered by it, it would nevertheless be good evidence between the parties for any other purpose, e.g., as an acknowledgment of a debt recited in it, so as to give a fresh starting point of limitation.—*Nundo v Ramsookhee*, 5 Cal 215, *Mugniram v Gurnukh*, 26 Cal 334, *Chuhar v Wasira*, 17 P R 1881. *Syad Muhammed v Jaisukh* 88 P R 1880. *Khushal v Behari*, 3 All 523, *Kubra v Lalji*, 20 O. C. 13.

Thus an unregistered mortgage-deed may be accepted as an acknowledgment of the simple debt, though it cannot be received as evidence of a transaction affecting the real property.—*Syad Muhammad v Jaisukh*, 88 P R 1880. *Chuhar v Wasira*, 17 P R 1881.

But if the acknowledgment were in respect of a right in immoveable property the provisions of the Registration Act would have to be taken into consideration, and its admissibility would depend upon whether it was required to be registered or not. Thus a compulsorily registrable but unregistered receipt, if it contains an acknowledgment of title to immoveable property, will be inadmissible in evidence.—*Faki v Khotu*, 4 Bom 590.

186 Effect of acknowledgment.—The acknowledgment of a debt does not alter the quality of the debt and does not create a new debt.—*Kamal v Krishna*, 3 Ind Cas 34. Thus, the acknowledgment does not entitle the creditor to claim interest at a higher rate than that which was prevailing up to the date of acknowledgment.—*Tanjore Ramchandra v Vellyanandan*, 14 Mad 258 (P C).

An acknowledgment of a mortgage-debt is good not only as against the person acknowledging, but also as against those deriving title under him even prior to the date of acknowledgment and subsequent to the debt acknowledged.—*Velayudu v. Narasimha*, 32 M L J 263. But an acknowledgment of liability made by one of the heirs of the debtor can be used only against the person acknowledging but not against all the heirs of the debtor.—*Collector of Jaunpur v Jamna Prasad*, 44 All 360 (367), 20 A L J 140, 66 Ind Cas 171.

If a person admits a right, it is a necessary implication that he also admits the legal consequences of that right. Therefore, where a person admits that the land of which he is in possession belongs to another, he admits that he is liable to restore the land to that other.—*Guru Cha*

which the same would be admissible under section 65 of that Act—*Chakku v Virarayan* 15 Mad 491 For instance where the original document has been lost or destroyed it is open to the plaintiff to give secondary evidence of the contents of the said document—*Shambhu v Ram Chandra* 12 Cal 267 *Wajiban v Kadir* 13 Cal 292

Where the date of acknowledgment has been altered, no evidence can be received as to the date on which it was given—*Sayed Ghulam Ali v Mujabat* 26 Bom 128

Where there are more debts than one oral evidence will not be received to identify the debt acknowledged with the debt sued on, for that would involve a question of the intention of the debtor as to what debt he meant, and no parol evidence of the intention of the party can be admitted for the purpose of identifying the debt acknowledged—*Beli Maharani v Collector* 17 All 198 (P C)

But where there is only one debt and the acknowledgment omits to mention the name of the mortgagor or the date of the mortgage or the amount of the debt parol evidence is admissible to prove the name the date or the amount—*Uppi v Mammavan* 16 Mad 366, *Narayana v Venkataramana* 25 Mad 20 (F B)

In England also the date of the bond may be supplied by parol evidence as also the name of the creditor to whom the debt is owing—*Hartley v Wharton* (1830) 11 A & E 934 *Edmunds v Downes* (1834) 2 Cr & M 459 Parol evidence may also be received to prove the exact amount due—*Dickinson v Hatfield* (1831) 1 Moo & R 141 *Colledge v Horn* (1825) 3 Bing 119 *Cheslyn v Dalby* (1840) 4 Y & C 238

189 Explanation I—*Exact nature of property or right*—An acknowledgment is sufficient even though it omits to specify the exact nature of the property or right that is an acknowledgement need not necessarily be in respect of the particular relief prayed for in the suit or application. It is a sufficient acknowledgment if it is of a liability whether pecuniary or in relation to other obligations, and is in respect of a right or property which is the subject matter of the suit or application—*Jageshar v Bir Ram*, 23 O C 176

Claim to a set off—Section 19 applies where the acknowledgment is coupled with a claim to a set off Under the English law also, a claim to a set-off does not negative a promise to pay—*Leland v Murphy*, (1865) 16 Ir Ch R 300 But where a plea in the written statement sets forth that the money is not owing and if it is it must be set off against an amount, such a plea is not an acknowledgment of liability it is a denial of liability with a claim to a set-off in the alternative—*Shank Meera v Shank Nairar*, 25 M L J 259

Refusal to pay—An acknowledgment accompanied by a refusal to pay is not a bar to a claim. According to the law in England, an acknowledgment accompanied by a refusal to pay is not a bar to a claim.

view was taken and it was held that an unstamped acknowledgment could not be given in evidence for any purpose including the purpose of saving limitation. The same view is taken in *Galsani v Hutchinson*, 39 Cal 289 16 C W N 913 and *Vagappa v A. I. R. Firm*, 49 M L J 306 A I R 1953 Mad 1213.

185. **Unregistered acknowledgment**—Though a compulsorily registrable but unregistered document relating to land is inadmissible in evidence in respect of any question as to the land covered by it, it would nevertheless be good evidence between the parties for any other purpose, e.g. as an acknowledgment of a debt received in it so as to give a fresh starting point of limitation—*Wido v Hamssookhee* 5 Cal 215, *Muguram v Gurmukh* 60 Cal 334, *Chuhar v Hakra* 17 P R 1881, *Syed Muhammad v Jaisukh* 48 P R 1880, *Akshat v Behari*, 3 All 523, *Kabra v Lalji*, 20 C 13.

Thus an unregistered mortgage-deed may be accepted as an acknowledgment of the simple debt though it cannot be received as evidence of a transaction affecting the real property—*Syed Muhammad v Jaisukh*, 48 P R 1880, *Chuhar v Hakra* 17 P R 1881.

But if the acknowledgment were in respect of a right in immovable property the provisions of the Registration Act would have to be taken into consideration, and its admissibility would depend upon whether it was required to be registered or not. Thus a compulsorily registrable but unregistered receipt, if it contains an acknowledgment of title to immovable property will be inadmissible in evidence—*Fah v Kholu*, 4 Bom 590.

186. **Effect of acknowledgment**—The acknowledgment of a debt does not alter the quality of the debt and does not create a new debt—*Hamal v Krishna* 3 Ind Cas 34. Thus, the acknowledgment does not entitle the creditor to claim interest at a higher rate than that which was prevailing up to the date of acknowledgment—*Tanjore Ramchandrar v Vellayanandan* 14 Mad 258 (P C).

An acknowledgment of a mortgage debt is good not only as against the person acknowledging but also as against those deriving title under him even prior to the date of acknowledgment and subsequent to the debt acknowledged—*Velayudu v Narasimha*, 32 M L J 263. But an acknowledgment of liability made by one of the heirs of the debtor can be used only against the person acknowledging but not against all the heirs of the debtor—*Collector of Jaunpur v Jamna Prasad* 44 All 363 (367), 20 A L J 140, 66 Ind Cas 171.

If a person admits a right it is a necessary implication that he also admits the legal consequences of that right. Therefore, where a person admits that the land of which he is in possession belongs to another he admits that he is liable to restore the land to that other—*Guru Charan*

v. Surendra, 19 C W N 263 Where a mortgagor describes his mortgagee as such and the latter admits in writing over his signature the correctness of that description, it is a necessary implication from the admission that the mortgagee acknowledges all the legal consequences of his position, one of which is his liability to be redeemed—*Sheikh Mahomed v Jamaluddin*, 10 Bom L R 385

Hence, an acknowledgment need not specify every legal consequence of the thing acknowledged Thus, an acknowledgment by a mortgagor of his liability under the mortgage carries with it an admission of all the remedies to which the mortgagee might be entitled under it—*Thakur Basant Singh v Thakur Rampal*, 6 O L J 248, 51 Ind Cas 985, *Ram Ajar v Beni Singh*, 25 O C 89, 68 Ind Cas 196

Similarly, an acknowledgment by a mortgagor in favour of the first mortgagee operates as against the puisne mortgagee whose title originated through the 1st mortgagee before the acknowledgment was given—*Aybindakeb v Jageshar*, 17 A L J 763, *Lakshmanan v Muthiah*, 40 M L J 126

An acknowledgment of the submortgage, made by the submortgagee does not involve an acknowledgment of the original mortgage, and therefore it will not operate to extend the period of limitation for a suit for redemption brought by the original mortgagor against the original mortgagee—*Bhagwan Ganapati v Madhab Shankar*, 46 Bom 1000, 24 Bom. L R 713, 70 Ind Cas 906 But where the submortgagee in submitting a list of the properties to be sold in execution of a decree obtained by him against his mortgagor (the original mortgagee) had described the property as subject to the original mortgage, *held* that the description amounted to an acknowledgment and saved limitation as against him in a suit brought by the original mortgagor to redeem the original mortgage—*Sanwal Das v Sayid Ali*, 22 A L J 1018, A I R 1925 All 174, 85 Ind Cas 330

The admission of liability to pay interest under the mortgage amounts to an acknowledgment of liability under the mortgage, including liability to give possession to the mortgagee under the terms of the mortgage—*Anant Ram v Inayat Ali*, 2 Lah L J 549 But an acknowledgment of liability in respect of the amount due as principal does not involve the admission to pay interest—*Filip & Co v Mahomedali*, 13 S L R 183

A mere acknowledgment of liability cannot be made the basis of a suit so as to constitute a fresh cause of action, but in a suit based on the original consideration the acknowledgment can be relied upon as a piece of evidence in proof of the debt—*Reets Ram v Lachman*, 23 A L J 900, 89 Ind. Cas 402, A I R 1926 All 155 (following *Ganga Prasad v Ram Dayal*, 23 All 502)

Acknowledgment in favour of minor—If an acknowledgment is made in favour of a minor, the new period of limitation is to be computed from

the date when the plaintiff becomes a major—*Ramji v Manja* 1919 P L R 3—see also 13 Mad 135 cited below

Acknowledgment of part of debt—An acknowledgment of a part of a debt will keep it alive only to that extent—*Chandra v Ramdin* 16 C W N 493

187 *New period of limitation*—The expression 'fresh period' presupposes the previous running of another period of limitation. Hence the new period is to be calculated from the date of acknowledgment only when that date is subsequent to the date from which the period would otherwise be computed. Thus a written acknowledgment of liability made before the debt has fallen due i.e. before time has commenced to run is of no effect so far as the shortening or extending the time for the institution of suits is concerned.—*Banning* 2nd Ed p 127

In computing the period of limitation the date on which the acknowledgment was signed (i.e. the date from which the new period of limitation runs) must be excluded under subsection (1) of section 12—*Jai Narain v Ishoba* 6 N L J 281

This section speaks of a *new* period of limitation not an extension of the old period. For instance time began to run against the plaintiff's father and after his death against the plaintiff who was then a minor. Subsequent to the death of the father an acknowledgment of liability was made by the defendant in favour of the plaintiff during his minority. Under this section the effect would be that the period already running is not simply extended but terminates and an entirely new period of limitation runs from the date of acknowledgment and as the minor falls under the strict wording of section 6 'limitation would run from the date of his attaining majority'—*Venkataramayyar v Kothandaramayyar* 13 Mad 135

Similarly when the defendant acknowledges the liability while he is absent from British India the period already elapsed is cancelled and a new period begins to run and if the defendant continues to remain abroad time will not run until he returns by virtue of sec 13

This section does not apply to section 48 of the C P Code because the term of 12 years prescribed by that section is not strictly speaking a period of limitation and therefore an acknowledgment cannot give the decree holder a fresh period of 12 years for the execution of his decree—*Mohant Krishna Dayal v Sakina* 1 P L J 214

188 *Oral evidence*—Oral evidence of the contents of a document cannot be received. Therefore where the acknowledgment of a debt was signed by the debtor each year and on the signing of a fresh acknowledgment the old one was given back to the debtor no oral evidence of these old acknowledgments could be given so as to show that they had been given while the debt was still unbarred—*Ziulnissa v Motider* 12 Bom 268. But this section must be read with sections 63 and 91 the Evidence Act and does not exclude secondary evidence in c

which the same would be admissible under section 63 of that Act—*Chathu v Virarayan*, 15 Mad 491 For instance, where the original document has been lost or destroyed, it is open to the plaintiff to give secondary evidence of the contents of the said document—*Shambhu v. Ram Chandra* 12 Cal 267, *Wajiban v Kadir*, 13 Cal 292

Where the date of acknowledgment has been altered, no evidence can be received as to the date on which it was given—*Sayed Ghulam Ali v Mujabai* 26 Bom 128

Where there are more debts than one, oral evidence will not be received to identify the debt acknowledged with the debt sued on, for that would involve a question of the *intention* of the debtor as to what debt he meant, and no parol evidence of the *intention* of the party can be admitted for the purpose of identifying the debt acknowledged—*Beli Maharani v Collector*, 17 All 195 (P C)

But where there is only one debt and the acknowledgment omits to mention the name of the mortgagor or the date of the mortgage or the amount of the debt parol evidence is admissible to prove the name, the date or the amount—*Uppi v Mammattan*, 16 Mad 366, *Narayana v Venkataramana* 25 Mad 220 (F B)

In England also the date of the bond may be supplied by parol evidence, as also the name of the creditor to whom the debt is owing—*Hartley v Wharton* (1840) 11 A & C 934 *Edmunds v Downes*, (1834) 2 Cr & W 459 Parol evidence may also be received to prove the exact amount due—*Dickinson v Hatfield* (1831) 1 Moo & R 141, *Colledge v Horn*, (1825) 3 Bing 119 *Cheslyn v Dalby*, (1840) 4 Y & C 238

189 Explanation 1—“*Exact nature of property or right*”—An acknowledgment is sufficient even though it omits to specify the exact nature of the property or right that is, an acknowledgement need not necessarily be in respect of the particular *relief* prayed for in the suit or application. It is a sufficient acknowledgment if it is of a liability whether pecuniary or in relation to other obligations, and is in respect of a right or property which is the subject matter of the suit or application—*Jageshar v Bir Ram*, 23 O C. 176

Claim to a set off—Section 19 applies where the acknowledgment is coupled with a claim to a set-off. Under the English law also, a claim to a set-off does not negative a promise to pay—*Leland v Murphy*, (1865) 16 Ir. Ch R. 500 But where a plea in the written statement sets forth that the money is not owing and if it is, it must be set off against an amount, such a plea is not an acknowledgment of liability; it is a *denial* of liability with a claim to a set-off in the alternative—*Shah Meera v Shah Nainar*, 25 M. L. J. 259.

Refusal to pay—An acknowledgment is sufficient, even if it is accompanied by a refusal to pay—*Janardan v Radhaballabh*, 23 C. W. N. 921. According to English law, however, such an acknowledgment is insuffi-

agent a promise to pay being the essential requisite of every acknowledgment. See *Lee v Hulme* (1895) L R 1 Ex 364.

Addressed to a person not entitled to the right—See Note 178 ante under heading Acknowledgment to whom to be made.

190 Agent duly authorised.—The test for determining the effect of acknowledgment by a third person will in each case be whether the person who keeps alive the debt had express or implied authority to act on behalf of those against whom limitation is sought to be arrested—*Kohardaraman v Shanmugam* 37 Ind Cas 603 (Mad) *Ishtishah v Shrofin* 2 C P L R 40.

The words agent duly authorised denote a general as well as a special authority. The authority contemplated in this section need not be in writing—*Deo Narain v Kukur Bind* 24 All 319 (F B). A manager, who has got general authority to purchase and pay for all things required for the use of his principal can without any special authority give a note promising payment of the price of goods to the supplier of the goods and the note is a sufficient acknowledgment of liability made by an agent duly authorised within the meaning of this section—*Raja Braja Sundar Deb v Bhola Nath* 24 C W N 153 (P C). But a *Mukhtar am* has no power to acknowledge a liability under this section unless he has been given special authority to make the acknowledgment of the liability—*Narain Rao v Manni Kunwar* 44 All 546 20 A L J 359 66 Ind Cas 394. The mere fact that the defendant used to write letters on behalf of the principal is not sufficient in law to enable the Court to infer that he was an authorised agent for the purposes of making an acknowledgment of liability—*Uma Shanker v Gobind* 46 All 892, 22 A L J 807 A I R 1924 All 855 80 Ind Cas 6.

Guardian—A guardian appointed under the Guardians and Wards Act, 1890 is an agent duly authorised within the meaning of this section and is competent to sign an acknowledgment of liability in respect of a debt provided it be shewn that the guardian's act was for the benefit of the ward—*Annapagauda v Sangadigypa* 26 Bom 221 (F B) *Sobhanadri v Sriramulu* 17 Mad 221.

Similarly, an acknowledgment by a natural guardian will give a fresh start for limitation, if it be shewn that the acknowledgment was for the benefit of the minor—*Bhulla v Nanalal*, 8 Bom L R 812 *Ram Charan v Gaya* 30 All 422 (F B), *Kailasa v Pennu Kannu*, 18 Mad 456.

The Calcutta High Court however, was of opinion that no guardian (whether certified or uncertified) could acknowledge a debt so as to give a fresh start for limitation against the minor—*Wajibun v Kadir*, 13 Cal 292, *Chhato v Billo*, 26 Cal 51, *Narendra v Rai Charan*, 29 Cal 647. But these cases are no longer good law in view of sec 21 (1).

Manager of joint family—The manager of a joint Hindu family has power to acknowledge the liability of the family, and in so doing he would

be considered as the agent duly authorised to bind the other members in such a case the acknowledgment need not be expressed as having been made in his capacity as *Karta*—*Hari Mohan v Sourendra* 41 C L J 535 *Sarada v Durgaram* 37 Cal 461 *Har Prosad v Bukshi Harihar* 19 C W N 860 *Bhaskar v Vijala* 17 Bom 512 *Inderpal v Mewalal* 36 All 264 (267) *Sanwal v Satjit Ali* 22 A L J 1018 *Chinnaya v Gurunathan* 5 Mad 169 (F B) *Ram Autar v Beni Singh* 25 O C 89 A I R 1922 Oudh 135 But where a creditor deals not merely with the managing member of a family but with all the members as co-obligors he cannot rely on an acknowledgment made by the manager as an acknowledgment made on behalf of all the members—*Varayana v Venkataramana* 25 Mad 220 (F B) An acknowledgment made by a member of the joint Hindu family who is not the manager of the family binds only the person acknowledging and the persons who claim through him but not the other members of the family—*Ramkishan v Hirde Ran* 71 Ind Cas 737 A I R 1923 Lah 135

Court of Wards —The Court of Wards has power to make acknowledgment of a debt due by the ward which would bind the ward and give a fresh starting point for limitation—*Rashbchary v Anand* 43 Cal 211 An acknowledgment by the Collector and Deputy Collector as agents of the Court of Wards is equally binding on the minor—*Kannamodalu v Alluri Sanarayudu* 34 Mad 1

Sarbarakar —The heir of the debtor having been disqualified and a *sarbarakar* of the estate having been appointed the latter had executed a mukhtear namah empowering an agent to act in reference to the land and the charges thereon The agent admitted the debt It was held that the *sarbarakar* not being a guardian and having nothing to do with the person or property of the proprietor but appointed only to manage the lands owing to the incompetency of the proprietor cannot be regarded as a person authorised to admit the personal debt of the proprietor for the purpose of this section—*Beti Maharanu v Collector* 17 All 198 (P C).

Co Mortgagee —Where the mortgage is a joint mortgage and incapable of being redeemed piecemeal one mortgagee is not an agent for the other joint mortgagees and an acknowledgment of the mortgagor's title made and signed by one mortgagee only cannot avail against the other mortgagees for the purpose of saving limitation in respect of the mortgagor's suit for redemption—*Dharma v Bahukund* 18 All 458 *Jwala v Achchey*, 34 All 371, *Bhogilal v Amritlal* 17 Bom 173 *Mahomed Ibrahim v Mahomed Ismail*, 5 Lah L J 111 See Note 1 under sec 21

Receiver —A receiver of a partnership firm appointed for collecting its outstanding and doing all things necessary for the realisation and preservation of its assets may be a person authorised to make an acknowledgment binding on the firm, if the acknowledgment was necessary for

the preservation of the partnership assets—*Lakshmunannan Chetty v. Sadaayappa Chetty*, 35 M L J 571. A receiver of an insolvent estate appointed under the C P Code can give a valid acknowledgment, in as much as the ownership vests in him and he can deal with it as owner—*Paramasivan v Aristotle* 5 L W 222.

Partners —See Notes under sec 21

Hindu woman —A Hindu woman in possession of her limited interest in the estate of her husband or father cannot make an acknowledgment so as to extend the period of limitation as against the reversioners. Her acknowledgment does not bind the estate or the reversioners—*Soni Ram v Kanhaya* 35 All 227 (P C) (affirming on appeal *Shib Shankar v Soni Ram*, 32 All 33) *Mohini Mohan v Sarat Sundari* 86 Ind Cas 353 A I R 1925 Cal 862. But see the proposed amendment of sec 21.

Legal Practitioner —An acknowledgment by a legal practitioner will be a valid acknowledgment to bind his clients. An admission made by a pleader on behalf of his client in a memorandum of appeal in a case not *inter partes* that a certain decree was a subsisting decree and capable of execution, will amount to an acknowledgment so as to give a fresh starting point of limitation for execution of such decree—*Hingon v Mansa*, 18 All 384. A letter from defendants attorney to plaintiffs attorney to the effect that the defendants were willing to pay the rent in question in case the plaintiff could show a good title was held to be a sufficient acknowledgment—*Rungo Lal v Wilson* 26 Cal 204.

Ex Agent —Acknowledgment signed by defendant's ex agent whose agency has terminated to the knowledge of the plaintiff, cannot prevent the operation of limitation—*Dinomoy v Luchmiput*, 6 C L R 101 (P C). But if the termination of agency (by death of the master) had been unknown to the plaintiff, the acknowledgment made by the gomasta after the death of the master would be valid and would save limitation—*Ebrahim v Chunilal*, 35 Bom 302.

191. Execution-proceedings —Explanation III has been added to set at rest the conflict of decisions which existed as to the question whether this section under the old Act applied or not to execution proceedings. The Madras High Court had held that this section was not applicable to applications for execution, while the other High Courts held the contrary view. See *Sreenivasachariar v Ponnusami*, 28 Mad 40, *Rama v Venkatesa*, 5 Mad 171 (F B), *Brojo v Gaya* 6 C L J 141, *Ishana v Grija*, 3 C L R 572, *Kally v Heera Lal*, 2 Cal 468. *Ramhit v Saigur*, 3 All 247 (F B), *Trimbuk v Kashi Nath*, 22 Bom 722.

An application in writing by a judgment-debtor asking the decree holder to postpone the sale and allow him time to make some arrangement for paying off the debt is an acknowledgment—*Ramhit v Saigur*, 3 All 247 (F B), *Tores v. Mahomed*, 9 Cal 730, *Norendra v Bhupendra*, 23 Cal 374 (387), *Subbalakshmi v Ramanujam*, 42 Mad 52, *Venkatray*

v Bijesingh, 10 Bom 108 so also a joint application by the decree holder and the judgment-debtor stating on the one hand that the former received a certain sum in part payment of the decretal amount, and on the other, that there was a certain balance due from the judgment-debtor under the decree—*Mahaminad v Prayag* 16 All 228 so also the payment of part of the judgment-debt by the judgment debtor, with an acknowledgment of liability by his pleader is sufficient under this section to give a fresh period—*Trimbuk v Kashinath* 22 Bom 722

So also, a petition by the judgment-debtor for the enlargement of time for the payment of the decretal amount—*Ram Coomar v Jakur*, 8 Cal. 716 so again, an application by the decree holder for certifying certain payment in satisfaction of a redemption decree amounts to an acknowledgment of the decree as an outstanding decree—*Bacharaj v Babaji*, 38 Bom 47 *Eusuffzeman v Sanchia* 43 Cal 207 so too, a statement by the decree-holder in his execution application that he had received a certain sum from the judgment-debtor—*Khatibannisa v Sanchia*, 20 C W N 272 An agreement made between the judgment-debtor and the decree holder in course of the execution proceedings would constitute an acknowledgment—*Fateh v Gopal* 7 All 424 A compromise to have the rest of the decree executed at a future time amounts to an admission on the part of the judgment debtor and entitles the decree holder to a fresh period from the date of the compromise—*Bindeswari v Awadh Behari* 6 Ind Cas 366 An endorsement of part payment of the decretal amount made on the decree by the judgment-debtor amounts to an acknowledgment of his liability under the decree—*Janki v Ghulam*, 5 All 201 If in a petition of insolvency filed by the judgment debtor the judgment-debt is specified that would amount to an acknowledgment—*Rampal v Nand Lal* 16 C W N 346

Where the judgment-debtor expressly admitted that there was an instalment decree in favour of the decree holder, that several instalments had already been paid that the instalment for *Poush* remained unpaid but as it had not become due the decree holder was not entitled to proceed with the execution, held that this was a sufficient acknowledgment—*Parash Nath v Ismail*, 26 C W N 486 34 C L J 195 64 Ind Cas 993

An acknowledgment of liability in writing by some of the judgment-debtors within three years from the date of the last application for execution would save limitation as against the persons making the acknowledgment—*Ban Behary v Jnanendra* 22 Ind Cas 709, *Chandra v Ramdin*, 16 C W N 493.

An acknowledgment by the judgment-debtor may save limitation against the auction purchaser, but such acknowledgment, if made after attachment, cannot prevail against the auction purchaser who is entitled to have the property purchased by him in the condition in which it was at the time of the attachment—*Rajeswari v Binodh*, 22 C. W. N 278,

192 Acknowledgment under previous Act—Suit under present Act —The law to be applied is the law in force at the time when the plaintiff's suit is brought and not the law in force at the time when the acknowledgment was made. An acknowledgment of a mortgage was made by an agent in 1868 while the Act of 1859 was in force and the suit on the mortgage was brought in 1909 under the present Act. It was held that although under the Act of 1859 an acknowledgment by an agent was not a valid one still that Act would not apply but the Act in force at the time when the suit was instituted i.e. the Act of 1908 would be applicable and the acknowledgment by an agent being a valid acknowledgment under this Act would save limitation.—*Zasbunnisa v Maharaja of Benares*, 34 All 109. *Soni Ram v Kankhaiya Lal* 35 All 217 (P C)

But where the right of action was barred before the new Act came into force it could not be revived by the new Act. Thus where a claim was barred before 1871 because an acknowledgment by an agent could not keep the claim alive it cannot be revived by the Acts of 1871 and 1877 by reason of the fact that those Acts make an acknowledgment by an agent valid. Therefore a suit brought on the claim in 1880 is barred.—*Dharma v Govind* 8 Bom 99

20 (1) Where interest on a debt or legacy is, before the expiration of the prescribed period paid as such by the person liable to pay the debt or legacy or by his agent duly authorised in this behalf,

Effect of payment of interest as much or of part payment of principal

or where part of the principal of a debt is before the expiration of the prescribed period paid by the debtor or by his agent duly authorised in this behalf,

a fresh period of limitation shall be computed from the time when the payment was made

Provided that in the case of part payment of the principal of a debt, the fact of the payment appears in the handwriting of the person making the same

(2) Where mortgaged land is in the possession of the mortgagee the receipt of the rent or produce of such land shall be deemed to be a payment for the purpose of

Effect of receipt of produce of mortgaged land

sub section (1)

Explanation—Debt includes money payable under a decree or order of Court

193. Sections 19 and 20.—Section 20 does not prevent the operation of section 19, and the two sections are not mutually exclusive. These sections cannot be treated as one general and the other special. Therefore, a payment though it may be ineffectual as a payment under sec 20 may nevertheless be treated as an acknowledgment under section 19, if it fulfils the requirements of that section. Moreover, section 19 only operates against the person who makes the acknowledgment, but sec 20 makes the part payment good in favour of any suit on that liability. Further, an acknowledgment under section 19 need not be addressed to the person entitled, but a part payment under sec 20 must be made only to the person entitled to payment—*Venkatakrishnaiah v Subbarayudu*, 40 Mad 698

194. Prescribed period.—The expression "prescribed period" means not the period prescribed for the repayment of the loan, but the period prescribed for the limitation of the suit, because in ordinary cases no debtor would make a payment before the time fixed for repayment of the loan—*Ramsebak v Ramlal*, 6 Cal 815 (dissenting from *Tarney v Sheikh Abdur*, 2 C L R 346). It means that the interest must be paid before the debt is barred—*Venkataratnam v Kamayya*, 11 Mad 218.

195. Payment.—This section does not specify any particular mode or form of payment. Where the common agent of joint debtors paid interest on the joint debt out of joint funds under express instructions contained in the instrument of his appointment, and this payment was relied upon by the plaintiff (one of the joint debtors) in a suit for contribution against the defendant (another joint debtor), it was held that this payment was clearly a payment in exoneration *pro tanto* of the liability of the plaintiff and such as is contemplated by this section—*Sukhamoni v Ishan*, 25 Cal 844 (P C)

A payment may be made not only in the current coin of the realm but in any other medium that the creditor may choose to accept—*Ragho v Hari*, 24 Bom 619. It is not necessary that the payment of a debt should be actually made in money. The payment may be in goods or even by a settlement of accounts between the parties, provided that the payment must be of such a nature that it would be a sufficient answer to a suit. The test to be applied is, whether the payment that has been made is of such a nature that it would be a complete answer to a suit brought by the creditor to recover the amount—*Kanyappa v. Rachapa*, 24 Bom. 493; *Mylan v. Annai*, 29 Mad 234, *Kollipara v. Maddulla*, 19 Mad. 340, *Narsoomal v. Athmal*, 9 S. L. R. 27. Thus, a payment made in goods will be sufficient if that is the intention and agreement—*Hart v. Nash*, (1835) 2 Cr M & R 337; *Hooper v. Stevens*, (1836) 4 A & E 71. There may be a part payment by a mere settlement of accounts—*Amos v. Smith*, (1862) 31 L J Ex 423, *Maber v. Maber*, (1867) L R 2 Ex. 153. If by agreement money is paid by the debtor on behalf of the

creditor to a third person, that may be a sufficient payment as between the debtor and the creditor—*Worthington v Grimsditch*, (1845) 7 Q B 479. Thus a payment made by the mortgagors by means of a sale by the mortgagors to the mortgagees of a certain property other than that covered by the mortgage in suit is a good payment within the meaning of this section—*Raushan v Kankariya* 41 All 111 (at p 112). The payment may be made in the shape of a new bond passed for interest—*Domsing v Antone*, 1889 P J 39. So also, the receipt of produce of land was held to be a payment of interest where the payee of a promissory note had been put into possession under an agreement that the produce of land should be taken as interest—*Mylan v Annai* 29 Mad 234. But a plaintiff cannot rely on an entry made by the defendant in his own books crediting a sum to the plaintiff's account, because such an unilateral act does not amount to payment—*Kollipara v Maddulla* 19 Mad 340, *Musnuddin v Mahammad*, 1916 P L R 68, *Nagappa v Ramanathan*, (1916) 2 M W N 264, *Salappa v Annappa*, 47 Bom 128 (131). An entry of interest in the defendant's books even if made in the presence of the plaintiff does not amount to a payment of interest within the meaning of this section—*Ichha v Nalha*, 13 Bom 338 (343), *Palanisappa v Veerappa*, 34 M L J, 41. Similarly, where, subsequent to the adjustment of accounts by the defendant, he had been credited with the amounts of surplus proceeds of goods sold and with the proceeds of a hundi, such amounts were not 'payments' within the meaning of this section—*Varronji v Mugniram*, 6 Bom 103.

Where there are debts due on both sides, and the accounts are gone through by the parties and a balance struck this in effect constitutes a payment to the amount of the smaller debt—*Ashby v James*, (1843) 11 M & W 542, 63 R R 676, *Re Haakins* (1879) 20 W R (Eng) 240. But it is the striking of the balance that constitutes the payment, not the mere existence or even statement in writing of cross demands—*Williams v Griffith*, (1835) 2 Cr M & R 45 41 R R 685, *Scholey v Walton*, (1844) 12 M & W 510, 67 R R 414. Hence, an agreed statement of accounts where all the items are on one side only, if the statement is not signed by the party liable and is inoperative as an acknowledgment, will not be allowed to support an action on an account stated in respect of items which are statute barred—*Jones v. Ryder*, (1838) 4 M & W 32, *Nash v Hill*, 1 F. & F. 198, 115 R R 897, *Guljar v. Sarman*, 36 C L. J. 228, A I R. 1923 Cal 71.

Moneys realised in execution sale cannot be regarded as amounting to payment, because a payment relied on must be a voluntary acknowledgment, by the person making the payment, of his liability and an admission of the title of the person to whom the payment is made—*Ram Chandra v Deeba*, 6 Bom. 626, *Raghunath v Shtramones*, 24 W R 20; *Bemul v. Ikbal*, 25 W. R. 249.

Where the plaintiff gave his child to be maintained by the defendant, and it was agreed that interest on the promissory note executed by the defendant should be regarded as paid and discharged on account of the maintenance of the child, such maintenance was held to be a payment which took the case out of the statute—*Bodger v Arch*, (1854) 10 Exch 333 Where at an interview with the creditor the debtor put his hand into his pocket to pay the interest but the creditor stopped him and made a present of the amount to the debtor's wife, who was present, wrote a receipt acknowledging the receipt of money from the debtor as interest and gave it to her held that this amounted to a payment of interest by the debtor though no money was actually paid by him—*Maber v Maber*, (1867) L R 2 Ex 153

Under this section a payment is not a good payment unless it is made to the person entitled—*Venkata Krishnak v Subbarayudu* 40 Mad 698 (699) It must be made to the creditor or some one who is his agent Payment to a stranger is inoperative—*Stamford Banking Co v Smith* [1892] 1 Q B 765 Payment made to a person who is acting as the creditor's administrator although his title is defective is sufficient—*Clark v Hooper*, 10 Bing 480

If there are two debts and a payment is made by the debtor towards those debts without any specification, the creditor can appropriate the money in any way he likes He can apply some of the money in wiping off the smaller debt and credit the balance as part payment of the other debt See *Sakharam v Keval* 44 Bom 392, and section 60, Contract Act

Who can make payment—A payment saves limitation under this section if it is made by the person liable to pay it A purchaser of the equity of redemption is a person liable to pay the mortgage-debt within the meaning of this section hence if under a mortgage decree for sale of the mortgaged property, to which he is a party though exempted from personal liability, he pays interest as such such payment gives a fresh period of limitation for execution of the decree—*Askaram v Venkata swami*, 44 Mad 544 A second mortgagee is a person liable to pay the first mortgagee on the ground that he can only get the property by redeeming the first mortgage—*Bolding v Lane* (1863) 1 DeG J & Sm 122, *Chinnery v Evans* (1864) 11 H L Cas 115 (at p 135)

Payment towards debt—Where payments were made towards a debt, but there is nothing to shew whether they had been made in respect of principal or interest the Court is entitled to find out on the evidence for what purpose the payments were made—*Hem Chandra v Purna Chandra*, 44 Cal 567, *Arjan Mal v Amar Singh*, 3 Lah L J. 250 If the payment can neither be treated as a payment towards interest nor as a part payment of principal, it is ineffectual as a payment under this section, but it may be treated as an acknowledgment under section 19—*Venkatakrishna v Subbarayudu*, 40 Mad 698.

Payment through messenger—Where an agent sent money through a mohurrir and then followed it up by an entry of such payment with his own hand in his account book the payment should be treated as made by the agent and not by the mohurrir—*Sarajubala v Sarada* 23 C W N 336 *Duraisami v Krishner* 1919 M W N 797

196 Interest—It means interest or any part of the interest due—*Abdul v Mahlab* 11 A L J 477

Where there are several debts and payment of interest has been made by the debtor without specification the payment may reasonably be attributed to all the debts which are thus saved from limitation—*Hingu v Heraiba* 13 C L J 139 *Sathara v Thiraviya* 51 Ind Cas 240 (following 13 C L J 139)

197 Interest as such—It must be interest paid as interest and stated to be so at the time of payment or there must be evidence from which it can be inferred that the debtor intended that the amount should be appropriated towards interest—*Harayappa v Rachapa* 24 Bom 493 (at p 499) *Bitar Ram v Kunj Singh* 19 C W N 237 The mere appropriation by the creditor of the payment towards interest is not an indication that the debtor intended that the money should be applied towards interest—*Chanderpal v Duia* 19 Ind Cas 825 *Muhammad Abdulla v Bank Instalment Co* 31 All 495 *Jago v Mahadeo* 59 Ind Cas 709 The plaintiff must establish not only that there was payment within time but also that there was either an express intimation by the debtor or proof of the existence of circumstances going to shew that the payment was made on account of the interest of the particular debt sued on—*Munuddin v Muhammad* 1916 P L R 68 It is not essential that the debtor should on every occasion of payment state explicitly that the payment is made on account of interest as such it is sufficient if circumstances exist which make the conclusion inevitable that the payment must have been made on account of interest—*Charu Chandra v Karas Bux* 27 C L J 141 The question whether a payment of interest can be said to be interest as such is a question of fact in each case If interest is due and the whole amount is paid or if the amount paid is part of the amount which is due and the debtor does not take care to state that it is not paid as interest and the creditor appropriates it to interest as he has the right to do by law the ordinary inference would be that it was paid as interest Where the amount paid was the whole amount that was due both principal and interest it is impossible to draw any other inference than that a part of this amount was paid as interest—*Bandhu v Kayastha Corporation* 93 Ind Cas 295 A I R 1926 All 329

Where a certain sum was paid towards principal and interest or expressed to be made on account of principal and interest and it was not specified how much was paid for principal and how much for interest, it was held that there was a payment of interest as such—*Rat Mohan v*

Lakshu, 6 Ind Cas 16 (Cal), *Subraya v Pakaya*, 4 Bom L R 231 But where payment is not expressed to be made on account of interest or on account of principal and interest, but is simply made on account of the debt, it cannot be said that there is a payment on account of interest as such. The word as such means that there must be at the time of payment some mention that the payment is wholly or partly for interest—*Hormasji v Hajrat Yarkhan* 28 Bom L R 569, 96 Ind Cas 311, A I R 1926 Bom 423

The defendant at different times made payments to the plaintiff who was his creditor in reduction of the general balance of account against him but without intimating that any of such payments was to be appropriated in satisfaction of the interest due on his debt, and without making any memorandum. It was held that there had been no payment of interest as such nor any payment of principal as there was no memorandum by the payer—*Hannantmal v Ramba Bai* 3 Bom 198 *Damodar v Janki Bai* 5 Bom L R 350 *Maheswar v Baidyanath* 7 Ind Cas 7, *Munnuddin v Muhammad* 1916 P L R 65 But where there was an express provision in the bond that any money paid was to be applied first towards payment of interest and next towards payment of principal and money was paid by the debtor from time to time it was held that it might be safely assumed that the payment was for interest as such—*Gopi v Hardeo*, 31 All 285

Where interest was paid on an unregistered mortgage bond and the payment was entered in the bond it was held that as the bond not being registered was not admissible in evidence there was no payment of interest as such—*Venkaji v Shidramapa* 19 Bom 663

Labour in lieu of interest —Where the plaintiff proves that he received interest through the labour of the defendants till within three years before suit his claim is not barred by limitation—*Swaminatha v Mandaiyan*, 3 L W 552 see also *Muthukrishna v Pakkiri*, 33 Ind Cas 134 (Mad)

198 Part payment of principal—Fact of payment —Where part of the principal is paid the fact of its being a part payment need not be stated in so many words it may be inferred from the writing itself—*Runchordas v Pestonji*, 9 Bom L R 1329 Thus, if it appears that no interest was due at the time when the payment was made, it may be inferred that the payment could only have been made in part payment of the principal—*Curlender v Abdul Hamud* 43 All 216 A payment of interest on a mortgage bond, not expressly made as such, can nevertheless be taken as payment towards principal, if the fact of the payment appears from a document in the handwriting of the debtor making the same—*Hem chandra v Purna Chandra* 44 Cal 567 Where a decree does not bear any interest, any payment made by the judgment-debtor must be taken to have been made in part payment of the principal—*Harendra v. Gyan*

Chandra, 22 C W N 325 To constitute the payment of principal sufficient under this section, it must appear that the payment is a part payment of the principal. There shall be clear and unmistakable evidence, in the hand writing of the person making the payment of the fact that he made it in part payment of the principal and thereby impliedly admitted that he was still liable for payment of the balance of the principal—*Diwan Buta Singh v. Hukam Chand* 124 P R 1894. And this fact cannot be proved *aliunde* by the creditor—*Runchordas v. Pestonji* 9 Bom L R 1329. The endorsement need not specify that the payment was made *towards the principal* all that is required is that the *fact of payment* should appear in the hand writing of the person making the same—*Jada Ankanamma v. Vadimpalle Rama* 6 Mad 281. *Sakkiram v. Jebal* 44 Bom 392 (397). In *In re Ambrose Sumners* 23 Cal 592 Sale J observed — The proviso requires not that the part payment of the principal *as such* should appear in the hand writing of the person making the payment but that the *fact of payment* should so appear. * * It is to be observed that the words *as such* have been expressly applied by the earlier part of the section to the case of a payment of interest. * * The omission of these words in the proviso relating to a part payment of principal would seem to imply that all that is required to be attested by the hand writing of the person making the payment is the *fact of payment*.

If the part payment is made *within* the period of limitation the mere fact that the writing evidencing the payment was made after the period of limitation had expired will not render such hand writing useless for the purpose of saving a claim from the limitation bar. This section requires that the *payment* must be made within the period of limitation it does not require that the *writing* should be made before the expiration of the period. It only requires a *writing* as the mode of proving the fact of payment—*Venkatasubba v. Appusundaram*, 17 Mad 92, *Ramprasad v. Bansilal*, 19 N L R 6, 71 Ind Cas 17.

[By Bill No 8 of 1926 (Gazette of India, 1926, Part V, p 147, it is proposed to omit the words 'in the case of part payment of the principal of a debt' from the proviso, so as to make the debtor's endorsement necessary in the case of payment of interest also, as recommended by the Civil Justice Committee.]

199. *Actual payment not necessary*—Where an endorsement of payment on a bond is sought to save the bond from limitation, it is not necessary that there should be an actual payment of money at the time of the endorsement—*Thesiger v. Srinuasa*, 10 M L J. 25, *Lakshmi v. Ramaswamy*, 26 Ind Cas 754, *Ramakrishna v. Venkatasubba*, 28 Ind. Cas 15. But the period is to be reckoned from the date of the payment and not from the date of endorsement of such payment—*Lakshminarasimham v. Bharata*, 9 M L T 216, 8 Ind Cas 349.

200. *Hand-writing of the person making the same*.—The fact

part payment of the principal of a debt must appear in the hand writing of the person making the payment and not in that of any other person, even though the latter may have been expressly authorised to endorse, the fact of payment—*Manindra v Kanhat*, 4 P L J. 365; *Bishen Parkash v Siddique*, 1 P. L J 474, *Mukhi v Coverji*, 23 Cal 546 F B (overruling 23 Cal 553 note). *Joshi Bhaish nkar v Bai Parvati*, 26 Bom 246

Where a decree does not bear interest, any payment made by the judgment-debtor must be taken to have been made in part payment of the principal, and it must appear in the hand writing of the judgment-debtor in order that a fresh period may run from the date of such payment—*Harendra v Gyan Chandra*, 22 C W N 325

A letter written and signed by the debtor along with a part-payment of principal would save limitation—*Viswanath v Sri Ramchandra*, 17 M L T 78, 27 Ind Cas 744, *Sankaram Manchand v. Kaval Padamsi*, 44 Bom 392

Where the endorsement of part-payment of principal was in the hand-writing of a person other than the defendant, but it was signed by the defendant, it was held that this was not a sufficient compliance with the proviso Where part payment of the principal of a debt is made by a person who can write, the section requires that the whole of the entry recording the payment (and not the signature only) should be written by the person who makes the payment—*Lodd Gobindoss v. Rukmani*, 38 Mad 438, *Venhatashrishmah v Subbarayudu*, 40 Mad 698, *Niraj Khan v Dadabhai*, 41 Bom 166, *Santishwar v Lakhikanta*, 35 Cal 813, *Bahram v Sobha*, 23 C W N 930 *Bisheshwar v Madho Rao*, 17 N L R 40 But in such a case, although the payment will not be good as part-payment of the principal within the meaning of this section, still the endorsement will amount to an acknowledgment of liability under section 19—*Venhatashrishmah v. Subbarayudu*, 40 Mad 698, *Jaganadha v. Rama Sahu*, 17 M L T 80

Where the payment is made by a person who does not know how to write, the endorsement may be made in the hand writing of a third party and the payer may subscribe his mark to the endorsement—*Ellappa v. Annamalai*, 7 Mad 76; *Sesha v. Seshaya*, 7 Mad. 55; *Bahram v. Sobha Shetkh*, 23 C. W. N. 930, *Sri Ram Singh v. Kashi Mulla*, 2 P. L T. 355 Where no such mark is affixed, the provision of law has not been complied with—*Bahram v. Sobha Shetkh*, (supra). *Joshi v Bai Parvati*, 26 Bom 246

The words "person making the same (payment)" do not necessarily mean the person who physically hands over the money, thus if part-payment of principal is made by an agent of the debtor, but the money is sent through a peon with a slip signed by the agent, it is the agent who makes the payment, and since the fact of the payment appears in the handwriting of the agent (in the slip) it is sufficient to save limitation. It

is not necessary that the fact of payment should appear in the handwriting of the peon who physically hands over the money. Similarly if an agent of the debtor sends a cheque or notes by post the person actually making the payment and physically handing over the notes or cheque is the postman. But certainly the postman is not the person who makes the payment within the meaning of this section. The postman or the peon is merely a conduit pipe through which the money passes to the creditor, the duly authorised agent who sent the cheque or notes being regarded as the person who made the payment—*Ramkisan v Vairam* 53 Cal 163 34 Ind Cas 657 A I R 1926 Cal 510.

Where two persons are liable on a debt embodied in a *khata* and they make payments towards satisfaction of the debt, it is not necessary that both persons should make the entries in the creditor's books. It is enough if the writing is made by the debtor paying the debt and it is signed by both the debtors because under this section it is sufficient if the fact of payment appears in the handwriting of the person making the same—*Deschand v Jamshetji* 25 Bom L R 351 A I R 1923 Bom 369 74 Ind Cas 302.

201. Payment by cheque.—Where a debtor paid a certain sum of money by a cheque held that as it was a mere order for payment and not a payment itself and did not show on its face that it was given as a part payment of the principal it was not sufficient to keep alive the creditor's claim under this section—*Sardar Bachitar Singh v Jagat Nath* 1 P R 1897. Where the only evidence in the handwriting of the debtor of the part payment of the principal of a debt was the endorsement of a cheque to the creditor such endorsement did not satisfy the conditions of this section—*Mackenzie v Tiruvengadathan* 9 Mad 271. *Raja Chauder v Chand Prasad* 19 All 307. But the Calcutta High Court holds that where a cheque is signed by the debtor and addressed to the creditor in part payment of the principal the proviso is sufficiently complied with—*Kedar Nath v Dinobandhu* 42 Cal 1043 19 C W N 724. If a cheque is given in part payment of a debt the fresh period of limitation under this section should be computed from the actual giving of the cheque and not from the date when the Bank pays cash for it. But if a cheque is handed over to the creditor on the 5th January after banking hours the Court will presume that the payment was made on the 6th January—*Maurice v Morley* 29 C W N 496 89 Ind Cas 508 A I R 1925 Cal 937. In England also payment by cheque has been held to be a good payment when the cheque is honoured. See *Curne v Misa* (1875) L R 10 Ex 153 (164) and *Turney v Dodwell* (1854) 3 E & B 236 cited in 42 Cal 1043 at p 1046. See also *Garden v Bruce* 37 L J C P 112 3 C P 300. Where the debtor had addressed a letter to his creditor enclosing a cheque for a certain sum and requesting that it should be placed to the credit of the loan account it was held to be sufficient—*I. re Atchrose Sinner* 23 Cal 592.

202. Effect of payment —In a mortgage without possession, a portion of the produce was agreed to be paid as interest. The mortgagee sub-mortgaged half his rights. The sub mortgagee continued to receive from the mortgagor his share of the produce up to a period within six years of the present suit which was brought by the sub mortgagee against the original mortgagee. The question arose as to whether limitation was saved as against the original mortgagee by the payment of produce to the sub-mortgagee by the mortgagor within 6 years of the suit. It was held that where a debt is kept alive by section 20 (1) by payment made by a person liable to pay it, its effect is to save limitation not only against the person who makes the payment, but also to make the debt enforceable against any one liable for it, and that in this case the debt was kept alive against the original mortgagee—*Ram Chand v. Mewa*, 3 P. R. 1918.

Similarly, payment of part of the mortgage-debt made by the mortgagor will give a fresh start of limitation to the mortgagee not only against the mortgagor but also against any person interested in the mortgage, e.g. a person who had purchased a portion of the mortgaged property—*Doms Lal v. Roshan Dobay*, 33 Cal 1278, *Krishna Chandra v. Bhairab Chandra*, 32 Cal 1077, *Roshan Lal v. Kanhaiya Lal*, 41 All 111.

203. Agent duly authorised:—See notes under sec. 19. Part payment by an agent of the debtor within the lawful scope of his agency is sufficient—*Jones v. Hughes*, (1850) 5 Ex. 104, *Newbould v. Smith*, (1885) 29 Ch. D. 882. The agent who can give the creditor the benefit of sec. 20 has to act within the terms of his authority. If he exceeds his authority or does something which is not actually covered by his authority, he cannot bind the principal so as to give the creditor the benefit of this section—*Balaguruswami v. Guruswami*, 48 M. L. J. 506, A. I. R. 1925 Mad 703.

The guardian of a minor appointed under the Guardians and Wards Act is an agent authorised to make a part payment of the principal of a debt due by the ward, if it is shown that the guardian's act is for the protection and benefit of the ward's property—*Annappagauda v. Sangadigaya*, 26 Bom. 221 F. B. (overruling *Ranmalsingh v. Vadilal*, 20 Bom. 61); such a guardian is also an agent duly authorised to pay interest—*Narendra v. Ras Charan*, 29 Cal. 647.

A natural guardian is also an agent duly authorised to pay principal and interest on behalf of the ward. See section 21, which generally authorises all lawful guardians to make payments and acknowledgments. The case of *Tilak Singh v. Chutla Singh*, 26 All 598 (where it was held that a natural guardian was not competent to pay interest so as to save the bar of limitation) was decided under the Act of 1877, and is no longer good law in view of sec. 21 of the Act of 1903.

It is not necessary that the agent should be authorised in writing to make a payment, nor that he should be expressly authorised; it is sufficient that the authority is implied—*Birjmohan v. Rudra Perakash*, 17 Cal 951.

The words "duly authorised" include authority given by law, as well as authority given by act of parties. Thus, where the *Karta* of a joint Hindu family purporting to act for himself and his minor brother made payment of interest due on a debt contracted by himself and his father for joint family purposes, it was held that in making the payment the *Karta* acted both for himself and his minor brother, and was an agent duly authorised to make the payment—*Chandra Kanta v. Behari Lal* 31 C. L. J. 7. So also, a payment towards principal and interest made by the manager, and an endorsement on the pro note (executed by the manager for an amount borrowed for the expenses of the family) in his hand writing and over his signature had the effect of extending the period of limitation as against the junior members also, though the payment and endorsement did not purport to have been made and signed by him as manager—*Thankammal v. Kunhamma*, 37 M. L. J. 369.

A mortgagee who is required under his mortgage document to pay a portion of the consideration to a creditor of the mortgagor in discharge of the amount due to the latter for principal and interest, is not an agent authorised to make payment of interest only to the creditor so as to keep the debt alive, his authority being to pay off both principal and interest—*Alagappa v. Subramania*, 26 M. L. J. 509.

A person who acts as solicitor to the mortgagor and mortgagee can make payment of interest to the mortgagee on behalf of the mortgagor, and such payment keeps alive the mortgage—*Bradshaw v. Widdington*, [1902, 2 Ch. 430. Where a firm owes a debt, and on one of the partners retiring, the remaining partners undertake to pay it, the payment of interest by the remaining partners to the creditor keeps alive the debt against the retiring partner, whether the creditor was aware of the agreement or not, provided there has been no novation of contract—*Tucker v. Tucker*, [1894] 1 Ch. 724.

The payment of part of a debt by a receiver appointed to the estate of the debtor will keep the debt alive, since the receiver is to be deemed as an agent of the debtor—*Chinnery v. Evans*, (1864) 11 H. L. Cas. 115, *In re Hale*, *Lilley v. Foard*, [1899] 2 Ch. 107.

Court as 'Agent'.—On 29th September 1912 the final decree for sale was passed in a mortgage suit for Rs. 3,500 and odd. Two of the mortgaged properties were afterwards acquired under the Land Acquisition Act and the compensation money of Rs. 3,400 was deposited in Court and paid out to the decree holder on 11th August 1914. At the time of payment the Judge signed a paper showing that the amount was paid to the decree holder in his presence and through the Court. On 10th August 1917 (that is, within three years from the payment but more than three years after the decree) the decree holder filed an execution application for the balance due. Held that the application was not barred as the payment made by the Court in 1914 gave a fresh start for limitation.

time to prevent the decree from being barred, then execution can issue for the balance—*Laksh Narain v Felamani* 20 C L J 131, 27 Ind Cas 11 This is also assumed in *Jatindra Kumar v Gagan Chandra* 46 Cal 22 45 Ind Cas 903 The same view is taken by the Madras High Court—*Masilamani v Sethusami* 41 Mad 251, 254 (following 20 C L J 131) *Rajam Aiyar v Ananthharathnam*, 29 M L J 669 31 Ind Cas 318 *Narayana v Kunki Raman*, 20 L W 190, 82 Ind Cas 743 A I R 1925 Mad 131 But an uncertified payment towards the decree must satisfy the requirements of sec 20 (e.g. the payment must be endorsed on the back of a certified copy of a decree) otherwise the decree cannot be saved—*Narayana v Kunki Raman* (supra) In *Jatindra Kumar v Gagan Chandra*, 46 Cal 22, 45 Ind Cas 903 the Calcutta High Court has laid down that if a part payment is made in satisfaction of the decree within three years of the decree, (even though the payment is not endorsed by the judgment-debtor), and then an application for execution of the decree together with an application for certifying the payment is made within three years from the date of the payment, the payment would give a fresh starting point for limitation, being a step in aid of execution within the meaning of Article 182 (5), and consequently the application for execution would be within time But the Madras High Court disapproves of this ruling on two grounds, viz that the part payment in satisfaction of the decree not being endorsed upon the decree by the judgment-debtor did not satisfy the requirements of sec 20, and consequently it could not save limitation and secondly, the payment cannot be regarded as a step in aid of execution, for Article 182 (5) clearly lays down that it is the application for certifying the payment and not the payment itself that can be considered as a step in aid of execution, consequently, the application for certifying the payment being made more than three years after the date of the decree, the execution was barred—*Narayana v Kunki Raman*, (supra)

21 (1) The expression 'agent duly authorized in this behalf' in sections 19 and 20, shall, in the case of a person under disability, include his lawful guardian, committee or manager, or an agent duly authorised by such guardian, committee or manager to sign the acknowledgment or make the payment

(2) Nothing in the said sections renders one of several joint contractors, partners, executors or mortgagees chargeable by reason only of a written acknowledgment signed or of a payment made by, or by the agent of, any other or others of them.

206 **Lawful guardian** —It does not mean a guardian appointed by the Court, but a person who is entitled to act as guardian according to the personal law of the minor. Thus in the case of a Hindu minor a person who is lawfully acting as guardian though not legally appointed as such is a lawful guardian within the meaning of this section—*Gangayya v Ramaswamy*, 24 M L J 428. Under the Hindu Law in the absence of the father the mother is entitled to be the guardian of her infant sons in preference to their brother and a payment made by the brother of an infant judgment-debtor towards the decree, while their mother is alive cannot be said to have been made by a lawful guardian—*Bireswar v Ambika* 45 Cal 630. Under the Mahomedan Law a father's brother is a guardian of the *person* (and not of the *property*) of the minor nephews and nieces and a payment made by him of interest on a debt due by his deceased brother (the minors' father) cannot save limitation so as to keep the debt alive against the minor daughters of the deceased brother—*Yagappa v Mahomed* 9 L B R 78. So also a mother not being a guardian under the Muhammadan Law of the *property* of her minor son is not a lawful guardian and cannot sign an acknowledgment on behalf of the minor—*Chanan v Wadhu Ram* 1917 P L R 61.

207 **Partners** —This section does not mean that no payment or acknowledgment by a co partner will be deemed as an acknowledgment or payment made on behalf of the other partners and binding on them. The word only in subsection (2) is not to be treated as a surplusage. The meaning of this word is that the mere writing or signing of an acknowledgment by one partner does not necessarily of itself bind his co partners but if it can be shown that he had *power* to make the acknowledgment on behalf of himself and his copartners the acknowledgment will then of course be binding on them all—*Gadu Bibi v Parsotan* 10 All 418. *Premji v Dossa Doongersay* 10 Bom 358. But it does not follow therefore that if a copartner is not *specially* empowered to make an acknowledgment or payment on behalf of his other copartners an acknowledgment or payment made by him will not bind the other partners in the absence of direct evidence that a co-contractor or partner was authorised to make an acknowledgment or payment on his behalf such authority can be *inferred* from other surrounding circumstances such as the position of the other co-contractors or partners in the business though it cannot be laid down which circumstances should be deemed sufficient to warrant the inference—*Veeranna v Veerabhadraswami*, 41 Mad 427 (P B) 34 M L J 373 (overruling *Sheskh Mohideen v Official Assignee* 35 Mad 142. *K R V Firm v Seetharamaswami* 37 Mad 146 and *Vala subramania v Ramanathan* 32 Mad 421). *Rala Singh v Bhagwan Singh* 2 Rang 367 84 Ind Cas 391. *Mahadeva v Ramakrishna* 50 M L J 67, A f R 1926 Mad 114. In a going mercantile concern such agent is to be presumed as an ordinary rule—*Premji v Dossa* 10 Bom 3.

time to prevent the decree from being barred then execution can issue for the balance—*Lakshmi Narain v Felamant* 20 C L J 131 27 Ind Cas 11 This is also assumed in *Jatindra Kumar v Gagan Chandra* 46 Cal 22 45 Ind Cas 903 The same view is taken by the Madras High Court—*Masilamoni v Sethusami* 41 Mad 251 254 (following 20 C L J 131) *Rajam Aiyar v Anantharatnam*, 29 M L J 669 31 Ind Cas 318, *Narayana v Kunhi Raman* 20 L W 190 82 Ind Cas 743 A I R 1925 Mad 131 But an uncertified payment towards the decree must satisfy the requirements of sec 20 (e g the payment must be endorsed on the back of a certified copy of a decree) otherwise the decree cannot be saved—*Narayana v Kunhi Raman* (supra) In *Jatindra Kumar v Gagan Chandra* 46 Cal 22 45 Ind Cas 903 the Calcutta High Court has laid down that if a part payment is made in satisfaction of the decree within three years of the decree (even though the payment is not endorsed by the judgment-debtor) and then an application for execution of the decree together with an application for certifying the payment is made within three years from the date of the payment the payment would give a fresh starting point for limitation, being a step in aid of execution within the meaning of Article 182 (5) and consequently the application for execution would be within time But the Madras High Court disapproves of this ruling on two grounds viz that the part payment in satisfaction of the decree not being endorsed upon the decree by the judgment-debtor did not satisfy the requirements of sec 20 and consequently it could not save limitation and secondly the payment cannot be regarded as a step in-aid of execution for Article 182 (5) clearly lays down that it is the application for certifying the payment and not the payment itself that can be considered as a step in aid of execution consequently the application for certifying the payment being made more than three years after the date of the decree the execution was barred—*Narayana v Kunhi Raman*, (supra)

21 (1) The expression agent duly authorized in this behalf in sections 19 and 20, shall, in the case of a person under disability, include his lawful guardian committee or manager, or an agent duly authorised by such guardian, committee or manager to sign the acknowledgment or make the payment

(2) Nothing in the said sections renders one of several joint contractors, partners, executors or mortgagees chargeable by reason only of a written acknowledgment signed or of a payment made by, or by the agent of, any other or others of them.

Agent of person under disability

Acknowledgment or payment by one of several joint contractors, etc

206 Lawful guardian—It does not mean a guardian appointed by the Court but a person who is entitled to act as guardian according to the personal law of the minor. Thus in the case of a Hindu minor a person who is lawfully acting as guardian though not legally appointed as such is a lawful guardian within the meaning of this section—*Gargayya v Ramaswamy* 24 M. L. J. 428. Under the Hindu Law in the absence of the father the mother is entitled to be the guardian of her infant sons in preference to their brother and a payment made by the brother of an infant judgment-debtor towards the decree while their mother is alive cannot be said to have been made by a lawful guardian—*Bireswar v Ambika* 45 Cal 630. Under the Mahomedan Law a father's brother is a guardian of the *person* (and not of the *property*) of the minor nephews and nieces and a payment made by him of interest on a debt due by his deceased brother (the minor's father) cannot save limitation so as to keep the debt alive against the minor daughters of the deceased brother—*Yagappa v Mahomed* 9 L. B. R. 78. So also a mother not being a guardian under the Muhammadan Law of the *property* of her minor son is not a lawful guardian and cannot sign an acknowledgment on behalf of the minor—*Chaita v Wadhu Ram* 1917 P. L. R. 61.

207 Partners—This section does not mean that no payment or acknowledgment by a co-partner will be deemed as an acknowledgment or payment made on behalf of the other partners and binding on them. The word *only* in subsection (2) is not to be treated as a surplusage. The meaning of this word is that the mere writing or signing of an acknowledgment by one partner does not necessarily of itself bind his co-partners but if it can be shown that he had *power* to make the acknowledgment on behalf of himself and his co-partners the acknowledgment will then of course be binding on them all—*Gadai Bibi v Parsolon* 10 All 418. *Premji v Dossa Doo gersay* 10 Bom 358. But it does not follow therefore that if a co-partner is not *specially* empowered to make an acknowledgment or payment on behalf of his other co-partners an acknowledgment or payment made by him will not bind the other partners. In the absence of direct evidence that a co-contractor or partner was authorised to make an acknowledgment or payment on his behalf such authority can be *inferred* from other surrounding circumstances such as the position of the other co-contractors or partners in the business though it cannot be laid down which circumstances should be deemed sufficient to warrant the inference—*Veeranna v Veerabhadraswami* 41 Mad 47 (F. B.) 34 M. L. J. 373 (overruling *Sheikh Mohideen v Official Assignee* 35 Mad 142. *K. R. V. Firm v Seetha Swami* 37 Mad 146 and *Vala subramania v Rananatha* 32 Mad 421). *Rala Singh v Bhagwan Singh* 2 Rang 367. 84 Ind Cas 391. *Mahadeva v Ralakrishna* 50 M. L. J. 67 A. I. R. 1926 Mad 114. In a going mercantile concern such agency is to be presumed as an ordinary rule—*Prenji v Dossa* 10 Bom 358.

Mahadeva v Ramakrishna, 50 M. L. J. 67 But this presumption can be rebutted, and if it can be shewn that the acknowledgment of liability by one of the partners was not an act necessary for or usually done in carrying on the business of the partnership, the case will fall under the general rule contained in subsection (2)—*Dalsukhram v. Kalidas*, 26 Bom. 42.

If the partnership had been dissolved at the date of the acknowledgment, and the creditor had had notice of such dissolution, the acknowledgment by one partner will be of no avail as against the firm—*Dalsukhram v Kalidas*, 26 Bom. 42 In the absence of express evidence of authority, an acknowledgment of a partnership-debt by an ex-partner, after the dissolution of the partnership, is not binding on any other ex partner. Where, however, an ex-partner is authorised to collect the outstandings and pay all debts of the partnership, such authority includes the lesser power of acknowledging debts—*Muthuswami v. Shanbara Lingam*, 1915 M W N 722

According to English law also, so long as the partnership exists, each partner, in the absence of evidence to the contrary, is presumed to be the agent of the others to make payments on account of debts due by the firm, because payments by any one partner are payments by the firm; but as soon as the partnership is dissolved, such agency ceases unless specially reserved, and payments by one can then only be held to be payments by all on proof that such payments were actually authorised by all—*Watson v Woodman*, L. R. 20 Eq. 721 (730). *Wood v. Braddich*, (1808) 1 Taunt 104, *Fritchard v Draper*, (1831) Russ & Myl. 191, *Goodwin v Parlon*, 41 L. T. N. S. 91, *Bistow v Miller*, 11 Ir L. R. 461; *Lightwoods' Time Limit on Actions*, page 383 After the partnership has determined or been discontinued, a partner cannot validly acknowledge a partnership debt—*Thomson v. Washman*, (1856) 3 Drew. 628; *Kilgour v Finlyson*, (1789) 1 H. B. 155; *Watson v. Woodman*, (supra) But where the partnership has been discontinued or determined upon the condition that A only shall go out of it, and that it shall continue as between B and C, and there are also special arrangements by which A is to ostensibly remain a partner, and is to be entitled also to resume (in a certain event) his old position of a partner, in such a case B and C or either of them may validly acknowledge a debt of the old partnership (by payment of interest or part payment of the principal) so as to keep that old debt alive as against A—*Tucker v. Tucker*, (1874) 3 Ch. 429. 63 L. J. Ch. 737.

If the partnership had been dissolved by the death of one of the partners, an acknowledgment made by the surviving partners, unless they are specially authorised to do so, cannot bind the representatives of the deceased partner—*Rajagopala v Krishnaswami*, 8 M. L. J. 261.

208. Co-executors.—An acknowledgment by one executor only keeps alive the debt against the assets of the testator but is not sufficient by itself to make the other executors personally chargeable—*Dick v. Fraser*,

1897] 2 Ch 181, *Fordham v Wallis*, (1853) 17 Jur 228 *Astbury v Astbury*, [1898] 2 Ch 111

209 Co-mortgagees — An acknowledgment of the title of the mortgagor made by one only of two mortgagees would not avail to save the mortgagor's right of redemption from being barred by limitation where the mortgage was a joint mortgage and not capable of being redeemed piecemeal—*Dharma v Balmakund*, 18 All 458, *Bhogilal v Amritlal* 17 Bom 173, *Richardson v Younge*, L R 6 Ch 478

210. Co-contractors — One of several co-contractors (co-debtors, co-mortgagors, etc.) cannot make an acknowledgment or payment on behalf of the others. In England also, it has been laid down by Statute (Mercantile Law Amendment Act 1856, sec 14) that where there are two or more co-contractors or co-debtors (whether bound jointly only or jointly and severally) no such co-contractors or co-debtors shall lose the benefit of the bar of time by reason only of any part payment by any other or others of the co-contractors or co-debtors. And so, one co-debtor cannot make payment or acknowledgment to bind the others—*Jackson v Woolley*, (1860) 8 El & Bl 778

Co-mortgagors — A co-mortgagor cannot make an acknowledgment on behalf of another co-mortgagor, when there is nothing to warrant the inference that the former acted as an agent duly authorised by the latter in making the acknowledgment. Co-mortgagors stand in the position of joint contractors, and section 21 expressly lays down that one of several joint contractors cannot be chargeable by a written acknowledgment by reason only that such acknowledgment is made by another joint contractor—*Narayana v Venkataramana*, 25 Mad 220 233 (F B)

Surety — The expression 'joint-contractor' applies also to a surety—*Kothandaraman v Shanmugam*, 32 Ind Cas 608 (Mad). The principal debtor and the surety are often in the position of joint contractors, and under this section one joint contractor is not bound by an acknowledgment or payment made by another. A payment by the debtor does not keep alive the action against the surety, nor can a payment by the surety keep alive the debt against the principal debtor—U N Mitra's Limitation, 4th Edn, p 753. In England, however, it has been held that a principal debtor and surety do not stand in the position of co-contractors or co-debtors, and so, the payment of interest or a part payment of the principal by the principal debtor will keep alive the debt as against the surety—*Lindsell v Phillips*, (1885) 30 Ch D 291. See Note 203 under sec. 20

- 22 (1) Where after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party.

Effect of substituting or adding new plaintiff or defendant

Mahadeva v Ramakrishna, 30 M L J 67 But this presumption can be rebutted, and if it can be shewn that the acknowledgment of liability by one of the partners was not an act necessary for or usually done in carrying on the business of the partnership, the case will fall under the general rule contained in subsection (2)—*Dalsukhrām v Kāhidas*, 26 Bom. 42

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According to English law also, so long as the partnership exists, each partner, in the absence of evidence to the contrary, is presumed to be the agent of the others to make payments on account of debts due by the firm because payments by any one partner are payments by the firm, but as soon as the partnership is dissolved, such agency ceases unless specially reserved and payments by one can then only be held to be payments by all on proof that such payments were actually authorised by all—*Watson v Woodman*, L R 20 Eq 721 (730), *Wood v Braddich*, (1808) 1 Taunt 104, *Pritchard v Draper*, (1831) Russ & Myl 191, *Goodwin v Parlon*, 41 L T N S 91, *Bistow v Miller*, 11 Ir L R 461, *Lightwoods' Time Limit on Actions*, page 383 After the partnership has determined or been discontinued, a partner cannot validly acknowledge a partnership debt—*Thomson v Walthman*, (1856) 3 Drew 628, *Kilgour v Finlyson*, (1789) 1 H B 155 *Watson v Woodman*, (supra) But where the partnership has been discontinued or determined upon the condition that A only shall go out of it, and that it shall continue as between B and C, and there are also special arrangements by which A is to ostensibly remain a partner, and is to be entitled also to resume (in a certain event) his old position of a partner, in such a case B and C or either of them may validly acknowledge a debt of the old partnership (by payment of interest or part payment of the principal) so as to keep that old debt alive as against A—*Tucker v Tucker*, 1894] 3 Ch 429. 63 L J Ch 737

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209 Co mortgagees —An acknowledgment of the title of the mortgagor made by one only of two mortgagees would not avail to save the mortgagor's right of redemption from being barred by limitation where the mortgage was a joint mortgage and not capable of being redeemed piecemeal—*Dharma v Balmahund* 18 All 458 *Bhogilal v Amritlal* 17 Bom 173 *Richardson v Younge* L R 6 Ch 478

210 Co contractors —One of several co-contractors (co debtors co mortgagors etc) cannot make an acknowledgment or payment on behalf of the others. In England also it has been laid down by Statute (Mercantile Law Amendment Act 1856 sec 14) that where there are two or more co-contractors or co-debtors (whether bound jointly only or jointly and severally) no such co contractors or co-debtors shall lose the benefit of the bar of time by reason only of any part payment by any other or others of the co-contractors or co-debtors. And so one co debtor cannot make payment or acknowledgment to bind the others—*Jackson v Woolley* (1860) 8 El & Bl 7,8

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22 (1) Where after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party.

Effect of substituting or adding new plaintiff or defendant

(2) Nothing in sub-section (1) shall apply to a case where a party is added or substituted owing to an assignment or devolution of any interest during the pendency of a suit or where a plaintiff is made a defendant or a defendant is made a plaintiff

211 Scope of section.—Sub-section (1) does not apply to cases in which the plaintiff is added in the course of the suit in consequence of assignment of interest from the original plaintiff, but is confined to cases where the new plaintiff is added or substituted in his own right so that he may himself be considered to be instituting a suit independently of the right of the original plaintiff—*Arumache la v Orr*, 40 Mad 722. If the plaintiff is added in consequence of assignment of right from the original plaintiff the case will fall under sub-section (2) and not sub-section (1).

This section is confined to suits only and does not apply to applications—*Golab Hoer v Syed Mohamud* 2 P L T 619. See the definition in section 2 (10). The word suit in this section includes only the stages of a suit down to its termination by the decree of the trial Court and does not include an appellate stage or proceedings in execution of the decree made in the suit. Therefore an application to set aside an *ex parte* decree cannot as regards the added party be deemed to have been made when the added party was brought on the record—*Chandrika v Ramkurr*, 6 P L J 463, A I R 1935 Pat 88.

212 Addition of new plaintiff or defendant.—All plaintiffs who have a joint cause of action must be impleaded before the expiry of the period of limitation. If some of them institute a suit within time and the other plaintiffs are added after the period of limitation the claim of the original plaintiffs also who had a joint cause of action with the added plaintiffs would be barred as the claim could not be enforced without the additional plaintiffs—*Ramsebak v Ram Lal* 6 Cal 815. *Girnar v Mahbunnissa* 1 P L J 468. *Dalla Ram v Nibakumali* 1886 P R 3. *Mir Tapurak v Gopi Narayan* 1 C I J 251. *Molan Mall v Arpa Mal* 1906 P R 70. *Bhagela v Abdul Rahaman* 1 P L J 472 (Note).

1. Where one of three brothers sued alone for a joint debt, and when objection was taken to the form of the suit it was too late to bring in the other brothers as co-plaintiffs the debt having by that time become time-barred it was held that the suit must be dismissed—*Handas v Vaidya* 7 Bom 217. see also *Imamuddin v Isfahar*, 14 All 524. *Molan Mall v Arpa Mal* 1906 P R 70. But if no objection as to the non joinder of parties is taken by the defendants the suit will not be barred. Where the original plaintiffs alone sued within the period of limitation, and others who had a joint cause of action were added after the expiry of the period on their own application, no objection as to the non joinder of parties being taken by the defendants at any stage of the proceedings, the suit

would not be barred by reason of the addition of the new plaintiffs after the period of limitation—*Shirekullu Timapa v Ajjibal*, 15 Bom 297, *Pateshri v Rudra*, 26 All 528.

Where the cause of action is *separate*, a suit wherein certain defendants were added at a time when a separate suit against them would be barred, is liable to be dismissed as against *them* only on the ground of limitation—*Obhoy v Kritarthamoyi*, 7 Cal 284. But where the relief sought is not separable, the suit will be dismissed as against all the defendants—*Habibulla v. Achaibar*, 4 All 145.

The question whether the joinder of parties after the institution of a suit shall necessarily involve the bar of limitation if the prescribed period has expired, must depend upon the consideration of the question *whether the joinder was necessary* to enable the Court to award such relief as may be given in the suit as framed. If the fresh parties are joined merely for the purpose of safeguarding the right subsisting as between them and the others claiming generally in the same interest, the fact that the suit is barred as regards the freshly joined parties does not ordinarily affect the right of the original plaintiffs to continue the suit—*Guruvayya v Dattairaya*, 28 Bom 21 (17, 18), *Gehimal v Karmundal*, 10 S L R 38.

The test to be applied is—whether the suit was properly constituted at the date of the plaint so as to enable the Court to adjudicate as between the parties impleaded. A suit is not said to be properly constituted unless all the *necessary* parties are impleaded in it. By necessary parties are meant those parties who ought to be joined and who are indispensable, as without them no decree at all can be made. If these parties are not joined, then the suit is bad for non joinder, and the addition of these parties after the period of limitation will necessitate a dismissal of the suit. If however the necessary parties are joined, the non joinder of other persons who are not necessary or indispensable but whose joinder is only desirable to safeguard their own rights and the rights of others, does not render the suit as improperly constituted, and the joinder of those persons after limitation will not necessitate the dismissal of the suit—*Shaha Sahab v Sadashiv*, 43 Bom 575, *Coorla Spinning Mills v Vallabhdas*, 27 Bom L R 1168, A I R 1925 Bom 547, *Ram Chand v Subhan Baksh* 1902 P R 69, *Ramdoyal v Junmenjoy*, 14 Cal 791, *Imamuddin v Laladhur*, 14 All 524, *Ambika Charan v Tarini Charan*, 18 C W N 464, *Sital Prasad v Kaifut*, 26 C W N 488, A I R 1922 Cal 149, *Labhu Ram v Kanshi Ram*, 57 P R 1905.

Where a suit for sale of mortgaged property was instituted against the mortgagor's minor son, and upon the allegation of the guardian that the mortgagor (a Muhammadan) left a widow and two daughters, widow and the daughters were made defendants after the period of limitation, and it was contended by the added defendants that the barred against them, it was held, overruling the contention,

(2) Nothing in sub section (1) shall apply to a case where a party is added or substituted owing to an assignment or devolution of any interest during the pendency of a suit or where a plaintiff is made a defendant or a defendant is made a plaintiff

211 Scope of section —Sub section (1) does not apply to cases in which the plaintiff is added in the course of the suit in consequence of assignment of interest from the original plaintiff, but is confined to cases where the new plaintiff is added or substituted *in his own right* so that he may himself be considered to be instituting a suit *independently* of the right of the original plaintiff—*Arnachella v Orr*, 40 Mad 722 If the plaintiff is added in consequence of assignment of right from the original plaintiff the case will fall under sub-section (2) and not sub-section (1)

This section is confined to *suits* only and does not apply to applications—*Golab Hoer v Syed Mohammad* 2 P L T 619 See the definition in section 2 (10) The word *suit* in this section includes only the stages of a suit down to its termination by the decree of the trial Court and does not include an appellate stage or proceedings in execution of the decree made in the suit Therefore an application to set aside an *ex parte* decree cannot as regards the added party be deemed to have been made when the added party was brought on the record—*Chandrika v Rawhuer*, 6 P L J 463 A I R 1923 Pat 88

212 Addition of new plaintiff or defendant —All plaintiffs who have a *joint* cause of action must be impleaded before the expiry of the period of limitation If some of them institute a suit within time and the other plaintiffs are added after the period of limitation the claim of the original plaintiffs also who had a *joint* cause of action with the added plaintiffs would be barred as the claim could not be enforced without the additional plaintiffs—*Ramsebh v Ram Lal* 6 Cal 815 *Girnar v Mahbunnessa* 1 P L J 468 *Dalla Ram v Vibahumall* 1886 P R 8, *Mir Tapurah v Gopi Narayan* 7 C I J 251 *Molan Mall v Kripa Mall* 1906 P R 79, *Bhagela v Abdul Rahaman* 1 P L J 472 (Note)

Where one of three brothers sued alone for a joint debt, and when objection was taken to the form of the suit it was too late to bring in the other brothers as co plaintiffs the debt having by that time become time-barred it was held that the suit must be dismissed—*Kalidas v Nathu* 7 Bom 217, see also *Imanuddin v Liladhar*, 14 All 524 *Molan Mall v Kripa Mall* 1906 P R 79 But if no objection as to the non joinder of parties is taken by the defendants the suit will not be barred Where the original plaintiffs alone sued within the period of limitation, and others who had a joint cause of action were added after the expiry of the period on their own application *no objection* as to the non joinder of parties being taken by the defendants at any stage of the proceedings, the suit

so far as the assignee is concerned must be deemed to have been instituted when it was originally brought against the claimant and not when the assignee from the claimant was added as a defendant—*Krishnappa v Abdul Kader* 38 Mad 535

In a suit for pre-emption the transferee from the original vendee is not a necessary party and his addition after limitation does not affect the suit—*Karan Dial v Ali Muhammad* 31 P R 1913 A suit for pre-emption in respect of a sale was filed against the two joint vendees but it appeared that one of them had died previously to the suit. An application to bring his legal representatives on the record was not made till after the period fixed for the institution of the suit had expired. Held that the suit being barred against the representatives of the deceased vendee was also barred against the surviving vendee—*Hussain v Hakim* 86 P R 1919 52 Ind Cas 587 In a pre-emption suit there were four vendees, viz T, B, D and J, but the plaintiff at first joined in his plaint T, D and J, but did not join B (who was the father of T) and on objection being taken, he joined B long after the period of limitation. Held that the suit must be dismissed as a whole—*Jwala Das v Gopal*, 26 P L R 447, 88 Ind Cas 555 A I R 1925 Lah 343 A suit to redeem the mortgage was brought by some of the heirs of the mortgagor within the period of limitation and when subsequently the plaintiffs applied to make the remaining heirs party defendants to the suit the lower Court refused to add them as parties on the ground that the period of limitation had expired and the Court dismissed the suit. Held, that the other heirs were not necessary parties in the sense that the plaintiffs were to lose their rights to redeem because they had omitted to make those persons parties to the suit, but that they were necessary parties only for the record in order to satisfy the provisions of O XXXIV r 1, and to save multiplicity of suits, i.e. to prevent the mortgagee from being subjected to suits being filed against him in succession by various parties entitled to the equity of redemption. Section 22 did not therefore apply and the suit was not barred—*Shivabai v Shidheswar*, 45 Bom 1009

The addition, after the expiry of the period of limitation of a minor member of a Mitakshara family as a plaintiff to a suit on the mortgage is not fatal to the suit—*Thakurman v Das Ran*, 33 Cal 1079

Where two executors are jointly appointed under a will a suit brought by one executor is defective, and the addition of the other co-executor (who is a necessary party) after the period of limitation will bar the suit—*Sreerangiahann v Vaidalinga* 40 M L J 532

Where two out of several trustees of a temple sued to enforce certain claims of a temple and on an objection being taken by the defendants, all the other trustees were subsequently added as parties after the period of limitation, it was held that the addition of those representatives, though

out of time, would not bar the suit—*Ponnappa v. Venkatasubbaiah*, 1919 M. W. 435.

When a person is adjudicated an insolvent, the whole of his property passes to the Official Assignee by virtue of the vesting order. Consequently, nothing is left vesting in the insolvent which would give him a cause of action. So a suit by an insolvent in his own name, after his adjudication, cannot be maintained and the substituting the name of the Official Assignee later on is adding a new plaintiff within the meaning of this section—*Sayad Daud v. Mulna Mahomed*, 23 Bom. L. R. 554, A. L. R. 1926 Bom. 366.

It as owner of certain land brought a suit for damages for loss of crops. The defendant objected that it was a *benamidar* for his uncle. Thereupon the uncle was added as a second plaintiff at a time when a large portion of the claim had been barred. It was held that the first plaintiff as *benamidar* had full right to bring the suit, because he fully represented in his own person all the rights of the second plaintiff for whom he acted as agent all along. The addition of the second plaintiff's name did not make any difference in the character of the suit and would not necessitate the dismissal of the suit—*Raju v. Mahadeo*, 22 Bom. 672.

Suit by managing member.—A suit by a managing member will not be liable to dismissal on account of the other members of the family being added as plaintiffs after the period of limitation, if the newly added members ratify the institution of the suit by the managing member alone—*Sudulla Khan v. Akana Mal*, 58 P. R. 1682.

213. Action in tort.—In suits upon a contract, all persons having the same cause of action must sue jointly, and if one of them is added after the period of limitation the whole suit will be barred. But this rule will not apply to actions in tort in which several persons have been damaged by the same tortious act. Therefore, where a suit for compensation for illegal distraint was brought by one of two persons jointly entitled to the crops distrained, and the other person was added as a plaintiff after his claim was barred, it was held that the whole suit was not barred but the first plaintiff was entitled to compensation as far as he was injuriously affected by the illegal distraint—*Jagdeo v. Padarath*, 25 Cal. 85.

214. Delay of Court.—If the application for addition of parties is made within the period of limitation, but the order of the Court allowing the addition of parties is passed after the period, the date of the application will be regarded as the date of addition of the new parties, and the applicants will not suffer by reason of the delay of the Court—*Ramkrishna v. Ramabai*, 17 Bom. 29.

215. Amendment of plaint, misdescription, etc.—This section is not intended to apply to a case in which the ground on which the original defendant is sought to be made liable is merely shifted, without new persons being introduced as defendants—*Saminatha v. Muthayya*, 15 Mad. 417. Thus, where a plaint is amended without any persons being newly included

as defendants, this section does not apply, and the date of the original presentation of the plaint is the date of the suit—*Mohini Mohun v Bungsi*, 17 Cal 580 (P C) For instance, a suit was brought for the recovery of amounts alleged to have been spent by the plaintiff (ex shebait) in protecting the debutter estate and the defendant (who had been appointed receiver of the debutter estate) as well as all other possible claimants to the office of shebait were made parties The defendant was sued both in his capacity as receiver and in his personal capacity, but the Court directed an amendment in the plaint so as to raise directly the question as to which of the claimants was at present entitled to the office of the shebait and should represent the estate, and the defendant being found to be entitled to the office of shebait was impleaded as shebait; it was held that the amendment did not alter the nature of the suit and the defendant was not brought on the record as a 'new defendant' within the meaning of this section—*Peary v Narendra*, 37 Cal 229 (P C), affirming 32 Cal. 582 A suit was at first brought against an idol 'under the sarvarakarship of Basdeo Prasad' But on objection being taken by the other party, the plaint was amended by describing the defendant as Basdeo Prasad, Sarvarakar of the idol' This amendment was made after the period of limitation Held that such an amendment would not have the effect of introducing a new party into the record, and no question of limitation would arise—*Bodhi Rai v Basdeo Prasad*, 33 All 735 (F B) In a suit by a Hindu reversioner to recover property after the widow's death, the plaintiff, in the original plaint, stated that he claimed title through his father, but subsequently amended his plaint by saying that he claimed title through his uncle Held that it was not essential that the plaintiff should have named any intermediate reversioner through whom he claimed title, and as there was no substitution or addition of a new plaintiff, the amendment of the plaint after the period of limitation did not bring this section into operation—*Bisheshwar v Hira Lal*, 19 O C 221 Where the plaintiff in the original plaint did not say that he was suing on behalf of a Company, and on objection being taken by the defendant, he agreed that the decree should be in favour of the Company, and prayed that the plaint be amended so that the suit might proceed as being instituted on behalf of the Company, it was held that this was not a case of adding a new plaintiff, for the plaintiff was already on the record, but the amendment simply made clear the capacity in which the plaintiff instituted the suit—*Muthukrishna v. Rajam Aiyanger*, 30 M L J 57, 33 Ind Cas 357; *Rajam v. Muthukrishna*, 10 M L T 251, 25 Ind Cas 945 Where the plaintiff originally sued in his personal capacity, and subsequently the plaint was amended so as to show that the plaintiff sued on behalf of himself and as shebait, the amendment did not amount to an addition or substitution of a new plaintiff—*Kuarnam v. Wassef*, 19 C W. N. 1193 The plaintiff sued within the period of limitation in his personal capacity for a certain sum of money

against him Mr Rogers then retired from the services of the two companies and left the country. At the trial of the suit the plaint was amended by expunging the name of Mr Rogers. *Held* that the suit was not at first properly framed and that it must be taken to have been instituted against the two companies on the date when the plaint was allowed to be amended.—*I G S V & Rly Co v Lal Mohan Saha* 43 Cal 441, 22 C. L. J 241, 31 Ind Cas 35

Where the suit was originally brought against a Company and the plaint was amended by bringing the individual partners of the Company on the record the section was held to have no application as there was virtually no addition of *new* defendants but merely the correction of a misdescription.—*Pragi v Marutli* 7 All 84. In the plaint in a partnership suit two defendants were described as Joharmull Manmull and the plaint was subsequently amended by substituting the words Joharmull Khemka and Manmull Khemka. *Held* that such an amendment would not amount to a substitution of new parties but it was an amendment merely for the purpose of more clearly describing the parties who were already before the Court. Sec. 2, would not apply to the case.—*Seodoyal v Joharmull*, 50 Cal 549, 35 Ind Cas 81

In a suit to recover a debt due to a Company which had gone into liquidation the plaintiff was at first described in the plaint as The Official Liquidator Himalayan Bank Limited in Liquidation. Afterwards the plaint was amended and the plaintiff was described as The Himalayan Bank Ltd in Liquidation plaintiff. This amendment was made after the period of limitation had expired. It was held that the amendment did not introduce a new plaintiff into the suit so as to let in the operation of this section.—*Muhammad v Himalayan Bank* 18 All 198 F B (over ruling *Ghulam v Himalayan Bank* 17 All 292)

Similarly where the defendant was wrongly described as Mr P J Forbes but after the period of limitation the mistake was corrected and Miss P J Forbes was substituted it was held that the suit was not barred by limitation since the mistake was a clerical one, and the case was merely one of misdescription.—*Jogendra v Forbes*, 32 Ind Cas 87-(Cal)

Where two sons were placed on the record as the heirs of their deceased father and subsequently it transpired that the father did not die intestate, but left a will appointing one of such sons his executor, and the record was altered after the expiration of the period by placing that son as executor instead of as heir it was held that this change in the record was not an addition of a new defendant.—*Prasanna v Mahabharat* 7 C W N 575

The widow of a deceased person was appointed administratrix until her eldest son should attain majority and a suit was instituted by the widow after the eldest son had attained majority, under a *bona fide* belief that she was competent to sue as administratrix but on discovering her

mista' e she prayed that her three sons should be substituted as plaintiffs and the substitution was made at a time when the suit if instituted would be barred by limitation it was held that this was not an addition of new plaintiffs within the meaning of this section—*Aistarani v Saral Chandra*, 20 C W N 49 22 C L J 279 79 Ind Cas 680

Where a suit was brought on behalf of a Devasthanam in the name of a trustee who was not entitled to represent the idol the amendment of the plaint by placing the name of the right trustee on the record does not affect the suit The principle is that when the *cestui qui trust* (here the idol) is substantially on the record of a suit from the beginning the rectification of the original improper representation cures all original technical defects with effect from the date of the institution of the suit, and the rectification cannot be treated as the addition of a new party under this section—*Subramania Aiyar v Subba Naidu* 25 M L J 452

216. Addition of parties by Court —A Court in joining parties under sec. 32 of the C P Code 1882, cannot disregard any question of limitation in respect of the suit itself as affected by such joinder—*Imam Ali v Baijnath*, 33 Cal 613, *Ram Hinkar v Akhil Chandra* 35 Cal 519 F B (overruling *Fakera v Arimunnisa* 27 Cal 540 and *Grisik v Dwarka* 24 Cal 640 and virtually overruling 12 Cal 642 also), *Imamuddin v Lladhur*, 14 All 524

217. Assignment and devolution —Where the added plaintiff or defendant derives his title from the original plaintiff or defendant by an assignment or devolution pending the suit, he will not be treated as a new plaintiff or defendant, and the case is merely one of continuation of the original suit without any change in the date of the institution—*Fatteh Muhammad v Said Ahmad*, 3 P R 1907 *Meyappa Chetty v Subbramanian*, (1916) 1 M W N 455 (P C), *Suput Singh v Imrit Tewari*, 5 Cal 720, *Ganpat v Adarji* 3 Bom 312 (321)

The only sort of devolution of interest contemplated by section 22 of the Act of 1877 was devolution by death and therefore where in a suit instituted within time the plaintiff assigned over his interest and the assignees were substituted on the record in place of the original plaintiff after the period of limitation had expired the suit was held to be barred for the assignees were considered as new plaintiffs under the section—*Harak Chand v Deonath*, 25 Cal 409, *Abdul Rahman v Amirah* 34 Cal 612 (F B) But now sub-section (2) not only contemplates cases in which devolution of interest takes place by death but it extends to all cases of devolution and assignment

218 Addition of parties in appeal—Addition of parties in appeal is governed by O XLII r 20 of the C P Code When a Court takes action under this rule no question of limitation can arise—*Gajraj v Gour* 18 O C 90, *Nath Lal v Lala*, 9 A L J 410

This section applies only to plaintiffs and defendants, not to appel

and respondents as there is no Act which makes the former terms include the latter. Therefore where a party to a suit is not made a respondent to an appeal and the Court orders him to be made a respondent under sec 559 C P Code 1882 (O 41 rule 6 of the Code of 1908) he cannot object that the time for appealing against him has passed and that no relief can be granted as against him—*Marichya v Baroda Prosad* 9 Cal 355 *Solna v Khalak Singh* 13 All 78. Where the liability of two defendants was joint and the plaintiff by an oversight appealed against the first defendant only and the second defendant was made a respondent after the time allowed for appealing against him had expired it was held that section 22 did not bar the appeal even so far as it affected the second defendant. The appellate Court can add or substitute new appellants or respondents even after the expiry of the period of limitation—*Court of Wards v Gaya Prosad* 2 All 107. In *Ranjit Singh v Sheo Prosad* 2 All 487 the Judges while holding that the appellate Court is competent to add a respondent to the appeal have laid down that the appellate Court is not competent to pass a decree against such added respondent if the appeal with reference to the date of the addition of such respondent is barred under section 22 of the Limitation Act.

219 Transposition of party—A party transferred from the side of *pro forma* defendant to that of the plaintiff is not a new party to whom the provisions of sec 22 (1) will apply—*Dwarkanath v Monimohan* 19 C W N 1269 *Vagidarabala v Tarapada* 35 Cal 1065 *Husainara v Rahmaunessa* 38 Cal 342 *Municipal Council v Veeraperumal* 18 M L J 147 *Ahadiir Moideen v Rana* 17 Mad 12 *Jibanti v Gokool* 19 Cal 760.

23 In the case of a continuing breach of contract and in the case of a continuing wrong independent of contract a fresh period of limitation begins to run at every moment of the time during which the breach or the wrong as the case may be continues.

220 Continuing breach—A breach of a covenant for quiet possession is a continuing breach and a suit on such breach of covenant would not be barred so long as the breach continues—*Raj & Balu v Arnik Naray Ranchandra* 2 Bom 273 (93). A breach of a covenant to repair is a continuing breach because the covenant is broken every day the premises are out of repair—*Spoor v Green* L R 9 Ex 99 (111). A lessee allowing rooms to be used contrary to a covenant when he might have prevented such user, commits a continuing breach of contract—*Doe d Amler v Woodbridge* 9 B & C 316.

Where contrary to the terms of an agreement the defendant built his

oda so as to cover up a gutter, it was held that the continuance of the *oda* was a continuing breach of contract—*Ladakchand v Valhu* 1892 P J 299

By a family arrangement A agreed with B to refund to N the price of certain property sold by A to N of which a share belonged to B and of which B was put into possession under the arrangement. A having died without having paid the money, N obtained a decree against B for possession of a part of such property. Five years after N's suit, a suit was brought by B's representatives against A's representatives for damages for breach of the agreement. Held that this suit was not barred by limitation, as the breach was a continuing one and had not ceased even then—*Imdad Ali v Vyabai Ali*, 6 All 457

When one of the parties to a contract renders the performance thereof impossible, there is a continuing breach of contract throughout the whole of the contract period, and the suit may be instituted within three years from the expiry of that period—*Gurmukh v Secretary of State*, 16 P R 1899

A suit for partition of a house was brought in 1905. The suit was compromised, the defendant agreeing to transfer his interest to the plaintiff for a consideration, and the suit was dismissed. The agreement was not carried out and a second suit was brought for partition. Held that the right to partition was a continuing right and the breach of the agreement was a continuing wrong. The second suit was not therefore barred—*T C Mukherji v Afrul Beg*, 37 All 155

221 Continuing wrong.—The construction and occupation of a *balakhana* by the defendants over the mosque of which they were *Mut wallis* for the purposes of private residence is a continuing wrong so that a fresh period of limitation begins to run at every moment of the time during which the wrong continues—*Muhammad Ahmad v Muhammad Faraz*, 31 P R 1917

Every fresh appropriation of the income of a property by one co sharer to the exclusion of the other co sharers is a continuing wrong giving rise to a fresh cause of action to those co sharers for a suit for a declaration of their rights—*Harnam Singh v Makhan Singh* 1918 P W R 43

An infringement of a trade mark is a continuing wrong and a fresh cause of action arises *de die in diem* so long as the infringement continues—*Abdul Salam v Hamidullah*, 97 P R 1913. A trespass upon unmoveable property is a continuing one and the owner may sue the trespasser for compensation within three years of the termination of the trespass—*Narasimma v Ragupathi*, 6 Mad 176. Acts of trespass committed by the defendant over the plaintiff's land when the defendant has not acquired an easement for passing through plaintiff's land constitute a continuing wrong giving rise to a recurrent cause of action—*Sheo Prasad v N* 12 A L J 1150

and respondents as there is no Act which makes the former terms include the latter. Therefore where a party to a suit is not made a respondent to an appeal and the Court orders him to be made a respondent under sec 359 C P Code 1882 (O 41 rule 20 of the Code of 1908) he cannot object that the time for appealing against him has passed and that no relief can be granted as against him—*Manchya v Baroda Prosad* 9 Cal 355 *Sohna v Akhalak Singh* 13 All 78. Where the liability of two defendants was joint and the plaintiff by an oversight appealed against the first defendant only and the second defendant was made a respondent after the time allowed for appealing against him had expired it was held that section 22 did not bar the appeal even so far as it affected the second defendant. The appellate Court can add or substitute new appellants or respondents even after the expiry of the period of limitation—*Court of Wards v Gaja Prosad* 2 All 107. In *Ranjit Singh v Sheo Prosad* 2 All 487 the Judges while holding that the appellate Court is competent to add a respondent to the appeal have laid down that the appellate Court is not competent to pass a decree against such added respondent if the appeal with reference to the date of the addition of such respondent is barred under section 22 of the Limitation Act.

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The interference with the right of irrigation of a person is a continuing wrong within the meaning of this section—*Kanta v. Narain*, 1918 P. W. R. 1.

An obstruction caused by defendant to the immemorial egress of the plaintiff's rain water over defendant's land is a continuing wrong and the plaintiff's suit for removal of the obstruction is protected from limitation by the express provisions of this section—*Punja v. Bai Kuvar* 6 Bom. 5.

Where the defendant has not acquired an easement to drain his water on the plaintiff's land or roof the construction of a drain by the former on the latter's land or roof is a continuous wrong giving rise to a continuous cause of action—*Humphreys v. Mistry* 24 W. R. 17, *Nur Muhammad v. Gouri Shanker* 7 Cal. L. J. 463.

An obstruction to a watercourse is a continuous wrong as to which the cause of action is renewed from day to day so long as the obstruction continues—*Rajrup v. Abdul* 6 Cal. 394 (P. C.) *Ponnuswami v. Collector of Madurai* 5 M. H. C. R. 6.

The obstruction by the defendant of a channel through which water flowed from a natural stream into the plaintiff's land is a continuing wrong even though the stream had not a continuous flow and was dry for the greater part of the year—*Mishank Krishna Dayal v. Bhawan*, 3 P. L. J. 51 (39).

Where the right of a superior riparian proprietor to have the drainage water from his lands permitted to flow off in the usual course, was obstructed by the defendants (lower riparian proprietors) by blocking up the stream, it was held that their act was actionable whether special damage had or had not occurred, and so long as the obstruction continued, there was a continuous cause of action from day to day—*Subramaniam v. Ramakandra* 1 Mad. 335 *Kastwar v. Annoda Prasad* 22 C. W. N. 666.

Infringement of a right of way is a continuous wrong giving rise to a cause of action from day to day—*Soyan v. Shamel* 1 C. W. N. 96, *Virode v. Bharat* 2 Ind. Cas. 410 *Vann v. Wazidulla* 21 C. L. J. 640.

The disturbance of a right of ferry is in the nature of a nuisance and a continuing wrong within the meaning of this section—*Nityahari v. Dunne*, 18 Cal. 652.

Wrongful attachment before judgment, if the attachment continues for any length of time, will be a continuous tort and a suit for damages for such act will be governed by this section—*Surapnal v. Maneckchand*, 6 Bom. L. R. 704. But the Allahabad High Court is of opinion that a wrongful attachment before judgment is not a continuing wrong, as the wrong is complete as soon as the property is seized. That the intention of the Legislature is not to make section 22 applicable to such a case is indicated by articles 13 and 42 under which limitation is to be computed.

from the date of the cessation of the wrong—*Ram Narain v Umyao*, 29 All 615 (618)

A wrongful attachment of property by a Magistrate under section 146, Criminal P Code is a continuing wrong during the time that the attachment continues—*Brojendra v Sarojini* 20 C W N 481 (dissenting from *Rajah of Venkatagiri v Isakapalli* 26 Mad 410), *Panna Lal v. Pancku*, 49 Cal 544 In Madras however it has been held that such an attachment is not a continuing wrong and the period of limitation for a suit for declaration of title runs from the date of attachment—*Rajah of Venkatagiri v Isakapalli*, 26 Mad 410

Where the mortgagee in possession who is bound by the terms of the mortgage-deed to pay the Government revenue due on the land neglects to do so, and the mortgaged land is sold held that there is a breach of the covenant, and the breach is a continuing one The reason is that by the terms of section 92 of the Transfer of Property Act, the mortgagor on payment of the mortgage-debt is entitled to be put in possession of the mortgaged properties, and this obligation is a continuing obligation on the mortgagee which cannot cease so long as the right of redemption is not barred, therefore the mortgagee's failure to put the mortgagor in possession of the land after redemption, by reason of the land being sold, amounts to a continuing breach of covenant—*Siva Chidambara v Kamatchi Ammal*, 33 Mad 71

A calingula was constructed by the Government for the purpose of reducing the flow of water into a tank through a channel The necessary effect of the calingula would have been to cause the water diverted from the channel to flood the plaintiff's land To obviate this, a small drainage channel was formed by Government to carry off the surplus water Plaintiff contended that the drainage channel was not sufficient to carry off the water and that the water which flowed over the calingula stagnated on his lands and made them unfit for cultivation He prayed for a mandatory injunction directing that the calingula be blocked up The defendant pleaded limitation Held that the injury was a continuing one and that the suit was not barred by limitation—*Sankaravadivelu v Secretary of State*, 28 Mad 72.

222. Suit for restitution of conjugal rights.—The refusal of a wife to return to her husband, and allow him the exercise of conjugal rights, constitutes a continuing wrong giving rise to constantly recurring causes of action—*Bar Sar v Sankla*, 16 Bom 714, *Hemchand v. Shiv*, 16 Bom 715 (note), *Binda v. Kaunthia*, 13 All 126

Arts. 34 and 35 of Act XV of 1877 required a suit for the recovery of wife or for the restitution of conjugal rights to be instituted within two years from the date of demand, but as the personal law of H and Muhammadans does not require an antecedent demand in such Articles 34 and 35 could not apply to those suits The limitation

The interference with the right of irrigation of a person is a continuing wrong within the meaning of this section—*Kanta v Narain*, 1918 P W. R 177

An obstruction caused by defendant to the immemorial egress of the plaintiff's rain water over defendant's land is a continuing wrong and the plaintiff's suit for removal of the obstruction is protected from limitation by the express provisions of this section—*Punja v Bai Kuvar* 6 Bom 20

Where the defendant has not acquired an easement to drain his water on the plaintiff's land or roof the construction of a drain by the former on the latter's land or roof is a continuous wrong giving rise to a continuous cause of action—*Ramphul v Misree* 24 W R 97 *Nur Muhammad v Gouri Shauker* 2 Lah L J 463.

An obstruction to a watercourse is a continuous wrong as to which the cause of action is renewed from day to day so long as the obstruction continues—*Rajrup v Abdul* 6 Cal 394 (P C) *Ponnuswami v Collector of Madurai* 5 M H C R 6

The obstruction by the defendant of a channel through which water flowed from a natural stream into the plaintiff's land is a continuing wrong even though the stream had not a continuous flow and was dry for the greater part of the year—*Mahanth Krishna Daval v Bhavani* 3 P L J 51 (59)

Where the right of a superior riparian proprietor to have the drainage water from his lands permitted to flow off in the usual course, was obstructed by the defendants (lower riparian proprietors) by blocking up the stream, it was held that their act was actionable whether special damage had or had not occurred and so long as the obstruction continued there was a continuous cause of action from day to day—*Subramanya v Ranchandra* 1 Mad 335 *Kasuar v Annoda Prasad* 22 C W N 666

Infringement of a right of way is a continuous wrong giving rise to a cause of action from day to day—*Soojan v Shamed* 1 C W. N 96, *Nirala v Bharat* 2 Ind Cas 410 *Vasim v H'azidulla* 21 C L J 640

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ables even after the attachment had been set aside the detention was held to be a continuing wrong—*Yamuna Bai v Solayya* 24 Mad 339 The Allahabad High Court lays down the general rule that wrongful distraint is always a continuing wrong which is renewed every day that the distraint lasts and limitation runs from the date on which the distraint comes to an end—*Jhabbu v Batul* 45 All 208

The principle of this section has no application to a declaratory suit (e.g. a suit for a declaration that properties improperly alienated are the subject of a trust) and there is no recurring cause of action for a declaratory relief—*Moudun Md Takimul v Jagat Ballabh* 2 Pat 391 (403)

An inamdar gave his permanent tenant notice to pay enhanced rent or quit the land on a certain date and more than 12 years after the date mentioned in the notice sued the tenant to recover the enhanced rent or to eject. It was held that the suit was barred and that this section had no application to the case—*Gopalrao v Mahadevrao* 21 Bom 394 No reason has been stated in the judgment but it appears from the argument of counsels that the right to demand rent at the usual rate may be a recurring right giving rising to a continuous cause of action but the claim to demand enhanced rent is not a recurring right

A *rowak* or platform was erected by the defendant as an integral part of his building and was in existence for about 50 years but the land upon which the *rowak* stood belonged to the Municipality. It was held that the Municipality lost their right under Article 146A of this Act to that portion of the land upon which the *rowak* stood and that section 23 had no application as there was no continuing wrong the injury being complete on the erection of the *rowak* and the mere fact that its effect continued could not extend the time of limitation—*Asutosh Sadhukhan v Corporation of Calcutta* 28 C L J 494

Plaintiffs and defendants were joint owners of a courtyard. The defendants erected certain *chappars* or thatched sheds in front of the plaintiffs' house. Plaintiffs brought a suit for perpetual injunction directing the defendants to remove the thatched sheds and to restore the courtyard to its former condition. Held that this section was inapplicable in as much as the moment the *chappars* were erected the injury complained of and sought to be removed by the injunction was complete and there was no continuing injury under this section—*Lal Singh v Hira Singh*, 3 Lah L J 128

Where the defendant threw sulphuric acid on the face of the plaintiff, the period of limitation for a suit for damages for personal injury (Art 22) ran from the date on which the sulphuric acid was thrown on the plaintiff, and the continuance of its effects up to a later date resulting in loss of one eye did not make the wrong a continuing wrong within the meaning of this section—*Abdulla v Abdulla*, 25 Bom. L R 1333, A I R, 1924 Bom 290

cable to those suits was held to be Article 120 read with section 23, so that those suits were practically exempt from the bar of limitation—13 All 126. Articles 31 and 35 have been omitted from the present Act, so that those suits are now totally saved from limitation. See notes after Article 35.

But a suit for dissolution of marriage or for a declaration that a divorce had taken place between the parties is essentially different in cause of action from a suit for restitution of conjugal rights. Section 23 has no application to the former kind of suits—*Mid Hamidullah v Fakhr Jahan*, 65 Ind Cas 452, A I R 1922 Oudh 109.

223. What are not continuing breaches and wrongs.—The purchasers of certain land agreed to pay the vendors certain fees annually in respect of such land and further agreed that in default of payment the vendors would be entitled to the proprietary possession of a portion of such land. The purchasers never paid such fees, and more than 12 years after the first default the vendors sued them for possession of a portion of the land. It was held that there had not been a continuing breach of contract, and the suit was therefore barred by limitation—*Bhojraj v Gulshan*, 4 All 493.

Upon failure to pay the principal and interest secured by a bond on the day appointed for such payment a breach of the contract to pay is at once committed but the fact that no payment is subsequently made does not constitute a continuing breach—*Mansab Ali v Gulab Chand*, 10 All 85. *Bhagwant v Daryao* 11 All 416.

Where a mortgage-deed provided that interest should be paid annually and that on failure of the payment of any year's instalment the mortgagee should be entitled to take possession, the mortgagee's cause of action accrued on the first failure to pay interest, and there was no continuing breach of contract—*Achhar Mal v Hukman*, 28 P. R. 1897.

A clause in a *wajib ul arz* of a village ran as follows: "If a resident of this village shall leave his residence and go to and settle in another village, he shall not be entitled to a cultivation and possession." Held that though it should be treated as an agreement between the proprietors on the one hand and the tenants on the other that the abandonment by a tenant of his residence in the village and his settling elsewhere involved a forfeiture of the lease, still it was not an agreement capable of continuous breach within the meaning of this section, and the period of limitation (under Art 143) would run from the time when the forfeiture was incurred or the condition was broken—*Dhian Singh v Mehan Singh*, 180 P. R 1833.

An illegal distress or attachment of the tenant's crops by the landlord is not a continuing wrong. The wrong is complete and the cause of action arises on the date when the unlawful distress is made—*Panna Sanyal v Zemindar of Jayapur*, 23 Mad. 510; *Venkataramier v. Vaitiki*, 2, 35 Mad. 655. But where the landlord detained the tenant's move-

ables even after the attachment had been set aside, the detention was held to be a continuing wrong—*Yamuna Bai v Salayya*, 24 Mad 339. The Allahabad High Court lays down the general rule that wrongful distraint is always a continuing wrong which is renewed every day that the distraint lasts and limitation runs from the date on which the distraint comes to an end—*Jhabhu v Batul* 45 All 208.

The principle of this section has no application to a declaratory suit (e.g. a suit for a declaration that properties improperly alienated are the subject of a trust) and there is no recurring cause of action for a declaratory relief—*Moulvi Md Takimul v Jagat Ballabh* 2 Pat 391 (403).

An *inamdar* gave his permanent tenant notice to pay enhanced rent or quit the land on a certain date and more than 12 years after the date mentioned in the notice sued the tenant to recover the enhanced rent or to eject. It was held that the suit was barred and that this section had no application to the case—*Gopalrao v Mahadevrao* 21 Bom 394. No reason has been stated in the judgment but it appears from the argument of counsels that the right to demand rent at the usual rate may be a recurring right giving rise to a continuous cause of action, but the claim to demand enhanced rent is not a recurring right.

A *rowak* or platform was erected by the defendant as an integral part of his building and was in existence for about 50 years, but the land upon which the *rowak* stood belonged to the Municipality. It was held that the Municipality lost their right under Article 146A of this Act, to that portion of the land upon which the *rowak* stood and that section 23 had no application as there was no continuing wrong the injury being complete on the erection of the *rowak* and the mere fact that its effect continued could not extend the time of limitation—*Asutosh Sadhukhan v Corporation of Calcutta* 28 C L J 494.

Plaintiffs and defendants were joint owners of a courtyard. The defendants erected certain *chappars* or thatched sheds in front of the plaintiffs house. Plaintiffs brought a suit for perpetual injunction directing the defendants to remove the thatched sheds and to restore the courtyard to its former condition. Held that this section was inapplicable, in as much as the moment the *chappars* were erected the injury complained of and sought to be removed by the injunction was complete, and there was no continuing injury under this section—*Lal Singh v Hira Singh*, 3 Lah L J 128.

Where the defendant threw sulphuric acid on the face of the plaintiff, the period of limitation for a suit for damages for personal injury (Art 22) ran from the date on which the sulphuric acid was thrown on the plaintiff, and the continuance of its effect up to a later date resulting in loss of one eye did not make the wrong a continuing wrong within the meaning of this section—*Abdulla v Abdulla*, 25 Bom. L R. 1333, A. I I 1924 Bom 290.

24. In the case of a suit for compensation for an act which does not give rise to a cause of action unless some specific injury actually results therefrom, the period of limitation shall be computed from the time when the injury results.

Suit for compensation for act not actionable without special damage

Illustration.

A owns the surface of a field. B owns the subsoil. B digs coal thereout without causing any immediate apparent injury to the surface, but at last the surface subsides. The period of limitation in the case of a suit by A against B runs from the time of the subsidence.

224. Specific injury —The principle of this section is this: where, an act is rightful in itself: & unless and until damage results from it to another, the right of action is not complete and the time therefore does not run until the damage—*Roberts v Read* 16 East 215

But where the wrongful act of the defendant itself gives rise to a cause of action, irrespective of any specific injury, this section does not apply. Thus, where the defendant threw sulphuric acid on the face of the plaintiff which resulted in the loss of one of his eyes, the act of the defendant was itself sufficient to give rise to a cause of action for damages for personal injury (Art 22) as such an act was clearly punishable under the I P Code. Time would run from the date when the act of throwing sulphuric acid was committed, and not from the date when the specific injury (viz loss of eye) resulted—*Abdulla v Abdulla*, 25 Bom L R. 1333, A. I. R 1924 Bom 290

Where the defendant has erected obstructions in a public thoroughfare, thereby causing inconvenience to the plaintiff with the rest of the public, a civil action for their demolition cannot be maintained by the plaintiff alone unless it is alleged and proved that some special or particular injury or damage was sustained by the plaintiff in consequence of such obstructions—*Ramphal v. Raghunandan*, 10 All 493. Limitation will run as against the plaintiff when some particular injury results to him

When a municipality caused subsidence of the plaintiff's house by some works carried on under the authority of the Municipal Act and the plaintiff claimed damages, held that the plaintiff could not maintain any suit unless special damage was proved—*Dwarkanath v Corporation of Calcutta*, 13 Cal. 91.

Each separate specific injury constitutes a fresh cause of action, and a separate period of limitation will run for each. Thus, if the defendant

excavates in his own land and thereby causes a subsidence in the plaintiff's the person injured ought to sue in one action for all the effects, both existing and prospective of that subsidence. But if in consequence of the defendant not supporting the plaintiff's land, another subsidence occurs some years afterwards in consequence of the same excavation, the plaintiff will be entitled to bring a second suit for the subsidence, and limitation will run from the date on which it occurred—*Mitchell v Darley Main Colliery Co*, 14 Q B D 125 on appeal 11 App Cas 127

The illustration to this section is based on the case of *Backhouse v Bonomi*, 9 H L C 503

25 All instruments shall, for the purpose of this Act, be
Computation of time
 mentioned in instru-
 ments deemed to be made with reference to the
 Gregorian calendar

Illustrations

(a) A Hindu makes a promissory note bearing a Native date only, and payable four months after date. The period of limitation applicable to a suit on the note runs from the expiration of the four months after date computed according to the Gregorian calendar

(b) A Hindu makes a bond, bearing a Native date only, for the repayment of money within one year. The period of limitation applicable to a suit on the bond runs from the expiration of one year after date computed according to the Gregorian calendar

225 Native date.—In a simple unregistered bond, the date for repayment of money was fixed as 30th Chait 1286 (11th April 1830). The parties computed the time according to the Bengali Calendar, and 30th Chait 1289 being a holiday, the suit to recover money on the bond was instituted on the 1st Basakh 1290 (13th April 1883). The suit was held to be barred, time must be computed according to the English Calendar and the suit ought to have been instituted within 11th April 1883 (29th Chait 1289)—*Deb Narain v Ishan*, 13 C L R 153. See also *Dwarkanā v Raja Ram*, 13 A L J 486, 29 Ind Cas 980

The plaintiff sued on a note bearing a native date, Ashad Vadya 13th, Shak 1799 (7th August 1877), and containing a stipulation for payment of the money to this effect—“In the month of Kartic, Shak 1799,—that is to say, in four months,—we shall pay in full the principal and interest.” The plaint was filed on the 6th December 1880. It was held that the period of four months for repayment of the debt was to be calculated accord-

ing to the Gregorian Calendar, that the mention of Kartic 1799 as the time for repayment did not affect the question and the period of four months expired on 7th December 1877 (although that date corresponded with Margashirsha Shudhi 3rd), and that therefore the suit was not barred—*Rango v Babaji*, 6 Bom 83

A mortgage bond was dated 8th Asar 1283 Fash (14th June 1876) and the money was stipulated to be repaid in the "month of Jeyth 1289 Fash, being a period of six years " The last day of Jeyth 1289 answered to the 1st June 1882 but it was held that the period of six years from the date of the bond ended on the 14th June 1882, the time being calculated according to the *Gregorian Calendar*, and therefore a suit instituted on 12th June 1894 was in time—*Lahfunessa v Dhan Kunwar*, 24 Cal 382

If a starting point is to be calculated as so many months or so many years from a particular date, that point must be calculated according to the *Gregorian Calendar*. But if the starting point is otherwise fixed by the stipulation itself, as for instance where the intention was that the interest should be payable at the expiry of six months according to the *Hindi Calendar*, (that is to say on a *particular date* and not at the expiry of six months) and that the cause of action should arise on default, this section is not applicable—*Roshan Lal v Chowdhury Bashir Ahmed*, 22 A L J 902, 82 Ind Cas 330, A I R 1925 All 138

PART IV

ACQUISITION OF OWNERSHIP BY POSSESSION

26 (1) Where the access and use of light or air to and for any building have been peaceably enjoyed therewith as an easement and as of right without interruption and for twenty years

Acquisition of right to easements

and where any way or watercourse or the use of any water or any other easement (whether affirmative or negative) has been peaceably and openly enjoyed by any person claiming title thereto as an easement and as of right without interruption and for twenty years

the right to such access and use of light or air way water course use of water or other easement shall be absolute and indefeasible

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested

(2) Where the property over which a right is claimed under sub-section (1) belongs to Government that sub section shall be read as if for the words twenty years the words sixty years were substituted

Explanation —Nothing is an interruption within the meaning of this section unless where there is an actual discontinuance of the possession or enjoyment by reason of an obstruction by the act of some person other than the claimant and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof and of the person making or authorising the same to be made

Illustrations

(a) A suit is brought in 1911 for obstructing a right of way. The defendant admits the obstruction but denies the

way. The plaintiff proves that the right was peaceably and openly enjoyed by him, claiming title thereto as an easement and as of right, without interruption from 1st January 1890 to 1st January 1910. The plaintiff is entitled to judgment.

(2) In a like suit the plaintiff shows that the right was peaceably and openly enjoyed by him for twenty years. The defendant proves that the plaintiff, on one occasion during the twenty years, had asked the leave to enjoy the right. The suit shall be dismissed.

This section may be compared with section 13 of the Easements Act.

206. Scope of section.—This section is concerned only with the enjoyment of the easement, and does not purport to measure the extent of the right or to measure the extent to which a disturbance of the right is to be vindicated. It is not "because there be said to the Easements Act—*Paul v. Davis*, 33 Cal. 39."

207. Easement defined.—Section 4 of the Indian Easements Act V of 1882 defines an easement as "a right which the owner or occupier of certain land possesses, as such, not the universal enjoyment of that land, to do and continue to do something or to prevent and continue to prevent something being done on it, which, if not in respect of, certain other land, has a special character." This definition is "intended to include and cover 'easements' attached to the estate in possession of, 'rights' similar and possible continuities, 'rights' of way, and even a mere amenity" and the expression "to do something" denotes "actual and not potential" by the dominant owner, for the enjoyment of, "which" is the dominant estate, is not part of the soil of the servient estate of any land, covering or adjoining thereof." This definition of Easement however will prevail only in those provinces viz Madras, C. P., Coorg, Bombay and U. P., in which the Easements Act applies. The other provisions will be guided by the definition given in sec. 2 of this Act.

On the other hand, the present section and the one following as well as the definition of easement in section 2 will not apply in those provinces in which the Easements Act extends. See section 20, sub-section (1) post.

208. Profit a prendre.—In India, it has been held that the word "easement" as defined in sec. 2 has a much more extensive meaning than the word bears in the English law and embraces what in England is called a *profit à prendre*, that is to say, a right to enjoy a profit out of the land of another. A prerogative right of quarry is therefore an easement and may be claimed by any one who can prove a user of it that a user can prove and be has of right claimed and enjoyed it within a continuous period of twenty years, although he does not allege and cannot prove that he is or was in possession and enjoyment or occupation of any other

nant tenement—*Chundee v Shib*, 5 Cal 945. *Hill & Co v Sheoraj*, 1 Pat. 674, 64 Ind Cas 346 (The case of *Parbilly v Mudho*, 3 Cal. 276, in which the contrary view was held, was decided under Act IX of 1871)

229 Air and light —The Indian law, unlike the English Prescription Act, places light and air on the same footing—*Delhi and London Bank v Hem Lall*, 14 Cal 839 (855)

The only amount of light for a dwelling house which can be claimed by prescription or by length of enjoyment without an actual grant, is such an amount as is reasonably necessary for the convenient and comfortable habitation of the house—*Ibid* (at p 834) following *Bagram v Andhiranath*, 3 B L R O C 43 (46) *Modhoosoodun v Bissonath*, 15 B L R 361 The amount of light enjoyed during the period of prescription should not be taken into consideration in measuring the amount of light to which the dominant owner is entitled He does not obtain by his easement a right to *all* the light he has enjoyed He obtains a right to so much of it as will suffice for the ordinary purposes of inhabitancy or business according to the ordinary notions of mankind having regard to the locality and surroundings—*Jolly v Kine* 1907 A C 1 *Colls v. Home and Colonial Stores* 1904 A C 179 followed in *Paul v Robson*, 42 Cal 46 (P C)

229A. Peaceably —Repeated obstructions or interruptions by or on behalf of the servient owner show that the enjoyment has not been peaceable—*Eaton v Swansea Water Works Co* 17 Q B 267

230 Openly enjoyed —There is a difference between the mode of enjoyment of air and light on the one hand and of the other easements on the other It is sufficient if the air and light have been enjoyed peaceably, but the other easements must have been enjoyed *openly* and peaceably The reason of this difference is that every one can see what light and air his neighbour is enjoying by looking at the outside of his neighbour's house but other easements such as right of way may be used clandestinely

Where a party in the course of acquiring a right of way by user, himself blocks up the passage permanently, which renders the enjoyment of the easement impossible so long as the obstruction continues, there cannot be said to be an open enjoyment of the way within the meaning of this section—*Sham Churn v Tarney* 1 Cal 422

Under the English law a right of way cannot be gained by prescription unless with the *knowledge* of the owner of the servient tenement 'In order that such user may confer an easement it follows that the owner of the servient tenement must have *known* that such an easement was being enjoyed and also have been in a position to interfere with and obstruct its exercise, had he been so disposed'—*Gale on Easements*, *Dalton v Angus*, 6 App Cas 818 But this rule seems to be inapplicable to

because nothing is said in the Indian Limitation Act as to the knowledge of the servient owner being necessary for the acquisition of the right. The words "peaceably and openly" have been introduced into the Indian Act for the purpose of preventing those rights being acquired by stealth or by a constantly contested user, but actual knowledge of the user on the part of the servient owner is not necessary—*Arzun v Rakhal Chunder*, 10 Cal 214 (218)

231 As an easement' —A right of ownership and a right of easement are incompatible. If a person claims a site as owner, he cannot claim a right of way or user of watercourse over the same as an easement—*Jalaluddin v Asad*, 1883 A W N 66, *Chunilal v Mangal Das*, 16 Bom 592. The words 'as an easement' show that the acts relied upon as evidence of the existence of a right must be done by one person upon the land of another. The acts must not be done by him upon his own land or land in his possession. While unity of possession lasts, no question of easement can arise—*Anderson v Juggodumba*, 6 C L R 282 (284). A person as dominant owner cannot enjoy an easement against himself as servient owner—*Modhoooodun v Bisstonath*, 15 B L R. 361. On this principle, an easement is extinguished when the ownership of the dominant and the servient tenement vests in the same person.

A right of easement cannot be acquired against the landlord by the tenant in other lands of his landlord, since the landlord cannot enjoy a right of easement as against himself, so his tenant would not be able to have such a right as against him—*Mons Chunder v Baiyatha*, 29 Cal 363.

232 Enjoyment "as of right" —The enjoyment described by the words "as of right" does not mean user without trespass, but it means user in the assertion of a right—*Alimooddeen v Wuzoor Ali*, 23 W R 52. The words "as of right" connote that the person claiming the right must have exercised it as if he had been the true owner without permission or license from any one—*Sunder v Nag*, 4 P R 1917, *Futteh Ali v Asghar Ali*, 17 W R 11, *Diwan v Jagta*, 1 Lah 206 (209); *Askar v. Ramanniah*, 13 W R 344, *Aukhoy v Molla Nobbu*, 13 W R 449. To become an easement, the enjoyment of a right must be often peaceable and as of right. therefore the ability of the servient owner to stop the enjoyment irrespective of the dominant owner's will is inconsistent with the idea of a real easement existing—*Sunder v Nag*, 4 P R 1917.

The expressions 'as of right openly' etc have now been judicially interpreted, and it is now settled that in order to establish a right of easement it is enough for the plaintiff to prove that he has been exercising the right without interruption, without express or implied permission of the owner of the dominant (? servient) tenement and without secrecy or stealth—*Behari v Asutosh*, 41 C L J. 379, A. I R. 1925 Cal 788, 87 Ind. Cas 19.

The burden lies on the plaintiff to shew that he has been enjoying the easement as of right—*Baroda v Sreenath*, 18 Ind Cas 211 *Sheikh Khoda v Sheikh Tajuddin*, 8 C W N 359 But where long user is proved, the presumption is that the enjoyment is as of right until the contrary is proved—*Kunjammal v Rathnam Pillai*, 45 Mad 633 (637)

When the enjoyment of an easement is open and manifest, and when it is not had in such wise as to involve the admission of any obstructive right in the owner of the servient tenement, the enjoyment is "as of right" The phrase does not imply a right obtained by grant from the owner of the servient tenement—*Mathuradas v Bai Amthi* 7 Bom 522

In questions regarding user of way as of right the Court should consider the character of the ground the space for which the right is claimed, the relation between the parties and the circumstances under which the user took place The mere fact of frequent or constant user of the defendant's *uthan* (courtyard) by the plaintiff the parties being relations and neighbours, does not amount to proof of user as of right—*Meser v Hafizuddin*, 13 C L J 316

The nature and character of the servient land the friendship or relation between the dominant and servient owners and the circumstances under which the user had taken place may induce the court to hold that the user was not as of right but permissive—*Sheikh Khoda Buksh v Sheikh Tajuddin*, 8 C W N 359

Where the pathway claimed by the plaintiff lay through the courtyard of the defendant's house close to their kitchen and not far from a tank used by the female members of the defendant's family it was held that the inference might be drawn that the user was permissive and not as of right—*Doroda v Sreenath* 18 Ind Cas 211

Plaintiffs and defendants were co sharers of a well To gain access to this well from the road it was necessary for the plaintiffs to go across certain fields belonging to the defendants Plaintiffs had used this road without let or hindrance for a period of 20 years and this road was the only road they could use to gain access to the well It was held that having regard to the habits of the people of this country, the enjoyment of the road as of right would be presumed—*Diwan v Jagta*, 1 Lah 206 (209)

Where the plaintiffs had been enjoying the right to work a watermill on the land of the defendants for nearly 50 years and it was found that they had been paying Rupee one per annum in lieu of the privilege of working the mill it was held that the fact of payment was fatal to the plaintiffs case because they failed to establish their enjoyment as of right—*Sunder v Nag*, 4 P R 1917

The defendant, who had been using the water of the plaintiff's tank for irrigation purposes for more than forty years had paid a sum of to the plaintiff for repair of the embankment of the tank about 30 ago, it was held that since as the defendant was interested in

suit was instituted on the 25th November 1895. It was held that as there was no enjoyment of the right of way on the part of the plaintiffs within two years before the institution of the suit, the suit must fail—*Jahnani v Bindu Basini*, 26 Cal 593

235. Easement against Government.—Since subsection (2) did not exist in the Act of 1877, a title could be acquired as against the Crown by twenty years' user see *Arzan v Rakhai Chunder*, 10 Cal 214 at p 219. But under sub-section (2) of the present section the period has been extended to sixty years.

Compare section 15 of the Easements Act (V of 1882) which provides. "When the property over which a right is claimed under this section belongs to Government this section shall be read as if for the words 'twenty years' the words 'sixty years' were substituted."

236. 'Explanation'—Obstruction.—The plaintiff continued to use a water-course for a period of 19 years, 6 months and 19 days, when his enjoyment was interfered with by the defendant. Before one year from the date of interference had expired, the plaintiff instituted the present suit for an injunction restraining the defendant's interference. It was held that as the suit was brought after the expiration of 20 years from the date of the commencement of the enjoyment and within one year from the date of obstruction and as the statutory period had expired within two years next before the institution of the suit the plaintiff had established his right to easement. It was further held that as the obstruction in this case lasted for less than a year, the obstruction should be ignored for the purpose of calculating the period of 20 years, with the result that an easement could be acquired after an enjoyment of 19 years and a fraction, and that the requisite period of 20 years is curtailed by the Explanation to this section—*Sawan v Chatter*, 48 P R 1918

237. Acquiescence.—Acquiescence in the sense of mere submission to the interruption of the enjoyment does not destroy or impair an easement. To be effectual for that purpose, it must be attributable to an intention on the part of the owner to abandon the benefit before enjoyed—*Ponnusami v Collector of Madura*, 5 M H C R 6

238. Other easements.—The right of the owner of a high land to drain off its surplus surface water through the adjacent lower grounds is incident to the ownership of land in this country—*Abdul v. Gonesh*, 12 Cal 323. Where the defendants had erected a dam across a natural water course which was found to interfere with the natural drainage or the surplus rain water of the adjacent lands of the plaintiff, it was held that the plaintiff was entitled to have only so much of the dam removed as interfered with his right—*Ibid*. A certain 'ai' formed the boundary of two pieces of land belonging to the plaintiff and the defendant respectively. The plaintiff's land was on a higher level than that of the defendant, and from time immemorial the surplus water used to flow from

the plaintiff's land through certain passages in the 'al and across the defendant's land. It was held that the defendant could not do anything which would interfere with the egress of the water—*Imam v Paresb*, 8 Cal 468

A plaintiff who seeks to enforce the right to discharge surplus water or to establish the existence of an easement in respect thereof is required to prove the acquisition of the easement under this section—*Maung Tha v Ao Shue* 10 Bur L T 38 35 Ind Cas 394

Where the surplus water of the plaintiff's tank used to be discharged over the land of the defendant openly and uninterruptedly year by year, for more than twenty years the plaintiff will be presumed to have acquired an easement—*Pooroo Chundur v Shurud* 24 W R 228

Where a right to discharge dirty water is claimed as an easement the onus is on the dominant owner to prove all the points which are necessary to establish his right under this section to discharge dirty water from his house on the servient owner's house—*Bija Ram v Brij Lal* 26 P L R 42 84 Ind Cas 676 A I R 1925 Lah 297

A right to the uninterrupted flow of water along a defined channel over the lands of others may exist independently of the provisions of sec 26 and when such a right is claimed as a customary and hereditary right and evidence is given in support of long user such evidence may be sufficient to justify the Court in presuming a grant of the easement and a Court is not justified in dismissing the suit on the ground that there had been no user by the plaintiff within two years prior to suit—*Srinivasa v Secretary of State* 5 Mad 226

An easement of the supply of water from a natural stream may be acquired by 20 years user under this section—*Abdul Rahman v Muham mad Alam* 57 P R 1918

Right to discharge rain water —A right to discharge rain water flowing from the roof of the plaintiff's house upon the roof of the defendant's house can be acquired by prescription—*Mohan Lal v Amrallal*, 3 Bom r74 Where rain water from the plaintiff's buildings used to flow on to the defendant's land from time immemorial the plaintiff had by long user acquired a prescriptive right independently of the Limitation Act—*Punja v Bai Kuvar* 6 Bom 20

Pasturage —A tenant may have a right of pasturage on his landlord's waste lands by immemorial user—*Bholanath v Midnapore Zemindary Co*, 31 Cal 503 (P C)

Fishery —A right of fishery can only be claimed when the same person or persons are shown to have exercised it for a particular length of time Where the defendants alleged that they in common with all the inhabitants of a zamindari had all along exercised a right of fishing in certain bhuIs, it was held that their act amounted to mere trespass not to dispossession of the plaintiff, and that no prescriptive right of fishery could be acqui

by an *unascertained* mass of persons such as the inhabitants of a *zamindari*—*Lachmeput v Sadula* 9 Cal 698 A right in the nature of a *profit a prendre* cannot be claimed by prescription by a large and indefinite class of persons such as owners and occupiers—*Tilbury v Silva* 45 Ch D 98

A distinction should be drawn between an exclusive right of fishery involving an ouster of the real owner and a mere right to fish not excluding the rightful owner. An exclusive right of fishery is an interest in immovable property (see notes under Article 144) and may be acquired by 12 years adverse possession by operation of Art 144 read with section 28. But a mere right to fish not excluding the real owner is a *profit a prendre* and falls within the definition of an easement under sec 2 (5) and may be acquired only by 20 years possession under section 26—*Hill & Co v Sheoraj* 1 Pat 674 3 P L T 53 64 Ind Cas 346

In order to establish an exclusive right of fishery in a tidal navigable river it is necessary to prove that the plaintiff's user was in assertion of a right other and higher than the general right of the public to fish—*Abhay v Dwarka* 39 Cal 53 It is doubtful whether an exclusive right of fishery in a tidal and navigable river can be acquired by proof of mere enjoyment in the manner provided by section 26 such a right can only be acquired by a grant from the Crown—*Ibid Prosunno v Ram Coomar* 4 Cal 53

Ferry—The right to maintain a ferry over the property of another is a right of easement which can only be acquired by user for 20 years—*Pardi Singh v Secretary of State* 5 P L J 500 *Lachneshwar Singh v Manouar Hossain* 19 Cal 253 (P C) *Parmeshari v Mahomed* 6 Cal 608

Cornice—Where the roof of one person overhangs the land of another for more than thirty years such enjoyment will vest in the former a proprietary right in the space covered by the overhanging roof—*Mohan Lal v Amrallal* 3 Bom 174

239 Acquiring easement in other ways—The mode of acquiring an easement provided by this section is not the only way in which an easement may be acquired and where an easement is acquired otherwise than by 20 years user as for instance by grant express or implied the rule as to obstruction for more than two years does not apply—*Rajrup v Abdul* 6 Cal 394 (P C) *Charu v Dokouri* 8 Cal 956 *Punya v Bai Kuvar* 6 Bom 20 A person claiming a right of way based on custom need not rely on section 26 of the Limitation Act. Such a right may be established by proof of custom—*Ali Mahomed v Sheikh Katu* 70 Ind Cas 263 A I R. 1923 Cal 200 Section 26 of the Limitation Act is not exhaustive and does not exclude or interfere with other modes of acquiring easements and therefore it is open to the plaintiff to show if he can that he is entitled to a right which may be of the nature of an easement although not actually within the strict meaning of the term. Thus in Bengal where the mode of dedication of tanks to the public for bathing and drinking

purposes is well known when one finds that a tank exists for a long time past, and the public that is the people of its neighbourhood have enjoyed the use of the water of such a tank it is open to the Court to presume that the water of such a tank was dedicated by the owner for public use. Such a dedication can be inferred from the manner and the duration of such use. It is not necessary therefore to seek the aid of sec 26 of the Limitation Act for the acquisition of such a right.—*Bhabadev v Bhusan Chandra* 91 Ind Cas 717 A I R 1926 Cal 507

240 Issues in easement suit.—In a suit to establish an easement when limitation is pleaded the proper issues to be framed under this section are—

(i) whether the easement in question was enjoyed peaceably, openly and as of right by the plaintiff or those through whom he claims within two years of the institution of the suit and

(ii) in the event of the above issue being found in the negative, whether there is evidence of enjoyment on the part of the plaintiff or those through whom he claims of such a character and duration as to justify the presumption of a grant or other legal origin of the plaintiff's right, independent of the provisions of this section.—*Atul v Rajan* 6 Cal 812

27 Where any land or water upon, over or from which any easement has been enjoyed or derived

Exclusion in favour of reversioner of servient tenement

has been held under or by virtue of any interest for life or any term of years exceeding three years from the granting

thereof, the time of the enjoyment of such easement during the continuance of such interest or term shall be excluded in the computation of the period of twenty years in case the claim is within three years next after the determination of such interest or term, resisted by the person entitled on such determination to the said land or water

Illustration

A sues for a declaration that he is entitled to a right of way over B's land. A proves that he has enjoyed the right for twenty five years, but B shows that during ten of these years C, a Hindu widow, had a life interest in the land, that on C's death B became entitled to the land, and that within two years after C's death he contested A's claim to the right. The suit must be dismissed, as A with reference to the provisions of this section, has only proved enjoyment for fifteen years

241 This section is similar to section 8 of the English Prescription Act, and is almost word for word the same as section 16 of the Indian Easements Act. It may also be compared to sec 7 of the English Prescription Act which lays down that the time during which an infant, an insane person or a married woman is the owner of the servient tenement is excluded from the period during which a prescriptive right is in course of acquisition.

28 At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished.

Extinguishment of right to property

242 Application of section.—In cases where a special period of limitation is prescribed by a special or local law, it has been held that although this section may not apply to suits under special or local laws yet the general principle embodied in this section may be applied to such suits. Thus the Calcutta High Court applied the principle of this section to a case under Schedule III Art 3 of the Bengal Tenancy Act—*Nanda Kumar v Ajodhya* 16 C W N 351. See also *Dalip v Deoki*, 21 All 204 (suit under N W P Rent Act). And indeed the Judicial Committee of the Privy Council has laid down that if a person suffers his right to be barred by limitation the practical effect is the extinction of his title—*Ganga Gownda v Collector*, 7 W R 21 (P C).

Where no period of limitation is prescribed, this section does not apply. Thus, the Madras Regulation (VI of 1831) does not prescribe any period of limitation for a suit under that Regulation, nor does the first Schedule to this Act prescribe any limit for suits under that Regulation. Consequently such suits are not barred by any lapse of time, and there can be no extinction of title by operation of section 28 of the Limitation Act, nor an acquisition of title by prescription—*Pichuvayyan v Velakkundayan*, 21 Mad 134.

This section does not apply unless there is some one in adverse possession of the property. Until some one is in adverse possession, the owner of the property does not lose his right to the property merely because he happens not to be in possession of it for 12 years. Under this section his right is only extinguished at the determination of the period limited by the Act to him for instituting a suit for possession of property, that period cannot be determined unless it has commenced to run, and the period will not commence to run until the owner is aware that some one else in possession is holding adversely to himself—*Swamirao v Bhimabai*, 45 Bom 1020 (1923), *Sukhdeo v Ram Dulari*, 29 O C. 131, 92 Ind Cas 825, 1 F R. 1926 Oudh 313.

This section applies only to suits and not to applications, it does not

say that at the termination of the period of limitation for an application, any right shall be extinguished—*Bhanga Parada v Gannath*, 3 P L J. 478 (481)

This section only applies to persons *out of possession*, to persons who are in possession and have no occasion to sue for it, this section can have no application and does not prevent them from making use of any legal defence open to them in order to maintain their possession. Thus, the plaintiffs induced the defendant by fraud and misrepresentation to execute in their favour a deed of sale of the property in dispute. They did not pay the purchase money, nor obtained possession of the property. Within twelve years from this transaction the plaintiffs sued for possession of the property on the sale-deed. The defendant impeached the deed as fraudulent. The plaintiffs contended that as the defendant had not sued to set aside the deed on the ground of fraud, within 3 years under Article 91 or 95, or within 12 years from the date of sale, his plea of fraud was barred by limitation. *Held* that the plea of the defendant is not barred, this section applies only to a *plaintiff* instituting a suit for possession and does not apply to a *defendant* who relies on actual possession which has never been disturbed. The plaintiffs in this suit cannot seek to get a wider meaning put on section 23 so as to get it treated as a law of limitation applicable to the *defendant*, and the law of limitation cannot therefore be taken to have barred the right of the defendant to make use of any legal defence open to him (i.e. to impeach the sale on the ground of fraud)—*Hargavandas v Bajibhai*, 14 Bom 212, *Orr v Sundra*, 17 Mad 255, *Krishnacharya v Lingaiah*, 20 Bom 270, *Gokulchand v Nidadarmal*, 1 P R 1916. See also Note 7 at page 5 *ante* under heading "Suits."

243 *Suit for possession of property*.—This section contemplates that the person whose right is extinguished by lapse of time is a person *entitled to institute a suit for possession* of the property. Thus, if after the grant of a simple mortgage the mortgagor is dispossessed, what is the effect of the dispossession upon the title of the mortgagor and of the mortgagee? The mortgagor is the person who is entitled to recover possession against the trespasser, and if he does not sue within twelve years, his right (i.e. the equity of redemption) is extinguished. But does it affect the title of the simple mortgagee? Obviously not. The simple mortgagee is *not entitled to institute a suit for possession*; consequently the dispossession of the mortgagor does not extinguish the title of the mortgagee by lapse of time. His right to bring the property to sale remains unaffected—*Priya Sakhi v. Manbodh*, 44 Cal. 425. Where the property of which there has been adverse possession is subject to a mortgage, the adverse possession does not affect that mortgage, if such possession has been (and usually it will be) consistent with the continuance of the mortgage—Banning, 3rd Edn., p 85.

Similarly the fact that a Hindu widow's right to recover property

has become barred does not make this section applicable so as to extinguish the right of the reversioners because they are not entitled to institute a suit for possession during the lifetime of the widow See Note 589 under Art 141

Section 28 of the Limitation Act is limited to cases in which the bar of limitation applies to suits for *possession of property* Therefore, where a property was attached by the Magistrate under section 146 Cr P Code, such attachment did not amount to dispossession and a suit brought by the real owner for a declaration of right to the lands was not a suit for *possession of property* And although the declaratory suit if brought more than six years was barred under Art 120, such bar only affected the remedy or the relief by way of declaration, but *did not extinguish the right and title* of the true owner to the property, however long the attachment continued and the attachment did not work a forfeiture in favour of Government—*Rajah of Venkatagiri v Isakapalli*, 26 Mad 410

Similarly the act of the Government in possessing the land of the plaintiffs and maintaining a ferry over it when there is no intention to oust the plaintiffs from the ownership of the land, is merely an act in the exercise of a right of easement and does not constitute adverse possession so as to bring into operation the rule of 12 years' limitation, consequently the plaintiffs are not required to bring a suit for *possession* within 12 years, on pain of losing their property under this section, they can bring a suit for injunction against the Government within 20 years (i.e. before the Government acquires an easement)—*Pardip Singh v Secretary of State*, 5 P L J 500

This section applies to all property for the possession of which a suit can be instituted whether the property be moveable or immovable—*Kanharamkutti v Utholi*, 13 Mad 491 But it does not apply to suits for property which cannot be recovered in specie, e.g. debts, whether ordinary or judgment debts—*Ganda Mal v Nanak Chand*, 3 P. R. 1887 A suit for recovery of a *debt* is not a suit for possession of property, therefore limitation only bars the remedy, but does not extinguish the right to the debt—*Nursingur v Hurrykur*, 5 Cal 897, *Mohesh Lal v Busunt Kumaree*, 6 Cal 340 (overruling *Nocoor v Kally*, 1 Cal 328, *Krishna v. Okhlmoni*, 3 Cal 333, and *Ram v Jagatmonomohini*, 4 Cal 283). *Administrator General v Hawkins*, 1 Mad 267. *Ganda Mal v Nanak Chand*, 1887 P R 3 Therefore though an attorney's action for costs under Art 84 may be barred by limitation, his right to get the costs is not extinguished, so that if he has any form of lien upon any property in respect of his bill of costs, he can enforce that lien, notwithstanding that he cannot bring a suit to recover the costs—*Narendra Lal v Tarubala*, 25 C W. N. 800 Though a vendor's suit to recover purchase money may be barred, still if he retains possession, he can claim payment before giving up possession—*Subramania v Poovarai*, 27 Mad 28

Although a mortgagee may be barred after 12 years under Article 135 from suing for possession of the mortgaged property that does not prevent him from suing for foreclosure and from getting possession under the foreclosure decree. In the first case his right to possession is as *mortgagee* after foreclosure he takes possession as *owner*—*Ratha Ra v Sundar*, 83 P R 1883

Where the plaintiff as the agent of the defendant (landlord) let out the land to a tenant who was in possession and the plaintiff for more than 12 years appropriated to himself the rents collected and asserted a title in himself and then brought a suit for possession on the ground of acquisition of title by adverse possession *held* that so long as the tenant held possession under the tenancy he was the tenant of the defendant (landlord) and so long as actual possession was with the tenant the possession must be taken to be legally with the defendant who could not (and need not) have brought a suit for possession the defendant's title was not therefore extinguished under this section—*Krishnadixit v Bal dixit* 38 Bom 53. This section does not apply where there is no question of instituting a suit for possession against the party claiming title by prescription—*Muhammad Muntaq Ali v Mohan Singh* 45 All 419 (P C) 74 Ind Cas 476 21 A L J 757

244 Extinguishment of right — When the adverse possession of the corporal hereditament has continued for the appointed time the title of the true owner to that hereditament is extinguished and a new title in lieu thereof arises in the adverse possessor —Banning on Limitation 3rd Edn p 84. If a plaintiff in a plaint states facts with regard to his title which shew that the period within which he could bring his suit for possession has elapsed he states in law that his title is extinguished unless he can bring himself under some of the exceptions under which the law allows his title to continue—*Dawkins v Lord Peurhyn* 4 App Cas 58

The Indian Limitation Act lays down a rule of substantive law in section 28. It declares that after the lapse of the period provided by this enactment the *right itself* is gone and the title ceases to exist, and not merely the remedy. Therefore unless the plaintiff in a redemption suit gives *prima facie* evidence to show that his suit is brought within the time allowed by the Act he fails to show that he has a subsisting right to the property in suit or in other words he fails to prove his title—*Parmanand v Sahib Ali* 11 All 438 (F B)

Want of possession for 12 years after the date of purchase would extinguish the purchaser's title—*Lakshman v Bisai* 15 Bom 261. Where in spite of an auction sale the judgment debtor remained in possession for more than twelve years after the confirmation of sale and thereafter the auction purchaser obtained a sale certificate and obtained formal delivery *held* that the auction purchaser's title had become extinguished and that the subsequent obtaining of formal delivery of possession

of no avail, as his right commenced from the date of consummation of the sale and not from the date of the sale-certificate—*Mahamadunisa v Syd Zahid Raza*, 11 O L J 456, 10 W N 139, A. L. R. 1925 Oudh 20

A suit to recover the office of trustee of a temple involves a claim to the possession of the temple properties, and if such suit is barred by Art. 124, the right to the possession of the properties is lost—*Gopinidami v Dakshinamurthi*, 35 Mad 92, *Ram Prasi v Nand Lal*, 39 All 636, *Hassan Hassan v Hazra Begum*, 32 C L J 151

Twelve years adverse possession of land by a wrong-doer not only bars the remedy and extinguishes the title of the rightful owner but confers a good title upon the wrong-doer—*Gossain v Issur*, 3 Cal 224 *Abloy v Kally* 5 Cal 949 The title which is acquired by adverse possession is a new title in strictness of law it is not the old title which is transferred to the new owner, but only a title corresponding in quantity and quality to the old title Therefore if the property of which there has been adverse possession is a leasehold subject to a rent and to covenants, the new owner is not liable as an assignee of the lessee to that rent or to those covenants but he is liable on the ground that the lessor's right to the rent and his right also to re-enter under the proviso for re-entry are not prejudiced by the adverse possession which has only been between the lessee and the adverse possessor—*Banning* 3rd Edn, pp 84-85

Adverse possession for more than 12 years not only extinguishes the title of the true owner and debars him from suing for its recovery but also creates a title by negation in the occupant which he can actively assert, if he is in possession even against the true owner—*Nawab Bahadur v Gopal Nath* 13 C L J 625 *Budesab v Hanmanta*, 21 Bom 509 The principle is that when the title of the true owner has been extinguished by prescription his title is not revived by re-entry In other words even if the lawful owner should re-acquire possession, he is not thereby remitted to his original title He will be treated as a trespasser—*Kassim Hassan v Hazra Begum* 32 C L J 151 *Brassington v Llewellyn*, (1858) 27 L J 12x 297

A property acquired under this section by adverse possession by a widow who claims and holds a widow's estate enures to the estate of her deceased husband and descends upon her death accordingly She does not make the property as her *stridhan* but she makes it good to her husband's estate—*Ishwari v Safachand* 5 Lah 192 (P C)

A right to an office in a temple and to the possession of the lands attached thereto or its endowments can be acquired by adverse possession for more than 12 years—*Higginson v Sundareswara*, 21 Mad 278 Where the members of one of the two branches of a family of hereditary trustees in a temple discontinued possession of the properties as also the performance of the duties of the temple for more than twelve years and the members of the other branch have been holding the office and endowments during

the period the rights of the former branch as a body would be wholly extinguished by operation of sec 28—*Rarianathan v Murugappa* 27 Mad 19

When the land in suit was alleged to have formed an endowment it was held that the plaintiff (purchaser) by his twelve years occupation had acquired a title even though his vendor had not had power to alien the property—*Vursingh v Moosharoo* 25 W R 282

Where an insolvent has been in possession of land from before the date of insolvency and for more than 12 years after the insolvency the official assignee not having taken possession held that the insolvent has acquired a right by adverse possession—*Suja Hosseini v Moiohar Das* 4 Cal 244

Where a suit brought by a ward after attaining majority to set aside an alienation made by his guardian and to recover the property alienated is barred under Article 44 the right of the ward to the property is also extinguished by the operation of this section See Note 331 under Article 44

PART V

SAVINGS AND REPEALS

Savings

29. (1) Nothing in this section shall affect section 24 of the Indian Contract Act, 1872

(2) *Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed therefor by the first Schedule, the provisions of section 3 shall apply as if such period were prescribed therefor in that schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law—*

(a) *the provisions contained in section 4 sections 9 to 18 and section 22 shall apply only in so far as and to the extent to which they are not expressly excluded by such special or local law, and*

(b) *the remaining provisions of this Act shall not apply*

(3) Nothing in this Act shall apply to suits under the Indian Divorce Act

(4) Sections 26 and 27 and the definition of "easement" in section 2 shall not apply to cases arising in territories to which the Indian Easements Act 1882, may for the time being extend

245 Change in the law —Sub section (2) has been recently amended by the Indian Limitation Amendment Act (X of 1922)

It originally stood thus —

Nothing in this Act shall affect or alter any period of limitation specially prescribed for any suit, appeal or application by any special or local law now or hereafter in force in British India

The effect of this change and the cases overruled or modified thereby have been pointed out in the notes to sections 3 4, 5 6 12 14 15 and 18

The phrase 'the remaining provisions of this Act shall not apply' can only mean that the remaining provisions of this Act shall not apply unless they are expressly made applicable by the special or local Act. To hold otherwise is to hold that it is a prohibition of the future as well as the past application of those provisions by a special or local Act, which is obviously impossible. The amendment of sec 23 of the Limitation Act in 1922 did

not restrict its scope but extended it. Under the old section 29 none of the provisions of the Limitation Act were applicable unless they were expressly included by the special or local Act. Under the new sec 29 some of them are applicable without being expressly included unless they are expressly excluded—the rest remain as before applicable only when they are expressly included—*Madho Rao v Balaji* 21 Ind Cas 563 A I R 1926 Nag 436

History of the amendment—It should be noted in this connection that the above sub section suffered many vicissitudes at the hands of the Legislature before it was finally amended into its present form. In Bill 4 of 1921 it was originally intended to be amended as follows—

Nothing in this Act shall—(a) * * *

(b) affect or alter any period of limitation specially prescribed for any suit appeal or application by any special or local law now or hereafter in force in British India

Provide 1 that nothing contained in any of the following sections namely 4 6 7 8 9 10 11 13 14 15 16 17 or 18 shall be deemed to affect or alter within the meaning of clause (b) any period of limitation prescribed by a special or local law unless special provision to the contrary is made therein (*Gazette of India Extraordinary* 212 1921)

This provision (sec 29) has been the subject of conflicting decisions by High Courts. The Calcutta (24 C W N 1) and Madras (39 Mad 593) High Courts have in effect held that the general provisions of the Act cannot be applied in computing the period of limitation specially provided by any special or local law whereas the Allahabad High Court has taken the contrary view on the ground that the special or local law is not in itself a complete code of limitation. The object of the Bill is to make it clear that the provisions in certain sections of the Act apply to the period of limitation prescribed by any special or local law unless they are specifically excluded.—*Statement of Objects and Reasons* (*Gazette of India Extraordinary* dated 21st February 1921)

This Bill was referred to a Select Committee and at the hands of the Committee it assumed the following shape—

Nothing in section 3 shall be deemed to affect or alter any period of limitation specially prescribed for any suit appeal or application by any special or local law now or hereafter in force in British India but the rest of the foregoing provisions of this Act shall apply for the purpose of determining any such period of limitation except in so far as and to the extent to which such law may expressly exclude the operation of the said provisions (*Gazette of India Part V* 193 1921)

The report of the Select Committee was as follows— We are unanimously of opinion that section 2) should provide that all the preceding provisions of the Act other than section 3 should be applicable for the purpose of determining the period of limitation fixed by any special or

local law, except in so far as any of those provisions may be expressly excluded by such law. Section 3 should obviously not be deemed to affect or alter a period of limitation specially fixed by any such law. We have therefore re-drafted this Bill and we think that the re-draft precludes as far as possible the risk of conflicting decisions by the various High Courts (*Gazette of India*, Part V, 1931, 1932).

But this re-draft did not meet with the approval of the members of the Legislative Assembly, and at the motion of Sir William Vincent was again referred to another Select Committee, at whose hands it finally assumed the present form.

The Select Committee gave the following reasons for the present change — We have carefully considered each section in parts II and III of the Act for the purpose of deciding whether it should apply to periods of limitation prescribed by special or local laws or not. We think provision should be made that section 4, sections 9 to 18 and section 22 should apply, unless they are expressly excluded by the special or local law and that the remaining provisions of the Act should not apply. This will, of course, not preclude amendments of special or local laws with a view to the application of such provisions — *Gazette of India*, 1922, Part V, page 74.

30 Notwithstanding anything herein contained, any suit for which the period of limitation prescribed by this Act is shorter than the period of Limitation prescribed by the Indian Limitation Act, 1877, may be instituted within the period of two years next after the passing of this Act, or within the period prescribed for such suit by the Indian Limitation Act, 1877, whichever period expires first.

Provision for suits for which the period prescribed is shorter than that prescribed by the Indian Limitation Act, 1877.

246 This section applies only to suits and not to applications, e.g. an application to set aside an *ex parte* decree—*Chidambaram v Karuppan*, 35 Mad 678 or an application for substitution—*Drayal v Sankaran*, 34 Mad 292 (fully cited under Art 177).

This section applies where there is a period of limitation prescribed both by the Act of 1877 and by the Act of 1908. It does not apply where no period of limitation was prescribed for a suit of the same nature under the Act of 1877. Thus, a suit by a shebait in 1910 to recover possession of *debtor* property held by the defendant under a permanent lease granted by a previous shebait in 1854 is now barred by Art 134 of the present Act, the suit not being brought within 12 years from the date of the lease. Section 30 will not save the suit from being barred, because under the Act of 1877, such a suit was not governed by Art 134 (that Article not applying

to a transfer by *lease*) and there was no other Article applicable to the case so that no period of limitation was prescribed for the suit under the Act of 1877—*Rameshar v Sri Sri Jiu Thakur* 43 Cal 34 (12)

The operation of section 30 is not limited to cases in which the period of limitation has been expressly altered but it applies also to a case where the period of limitation has been altered as the result of the alteration of the description of the suit. Thus Article 11 of the present Act is wider in its scope than Article 11 of the Act of 1877 and covers a suit by a claimant whose claim petition has been dismissed for default of appearance. Such a suit did not fall under Article 11 of the Act of 1877 and was not governed by the one year's rule. The present Act has therefore cut down the period of limitation and the suit brought within 2 years of the passing of the Act is in time—*Uma Charan v Heromoyee* 18 C W N 770 (771)

31. (1) Notwithstanding anything contained in this Act or in the Indian Limitation Act, 1877, in

Provision for suits by certain mortgagees in territories mentioned in the Second Schedule

the territories mentioned in the Second Schedule a suit for foreclosure or a suit for sale by a mortgagee may be instituted within two years from the date of the passing of this Act or within sixty years from the date when the money secured by the mortgagee became due whichever period expires first and no such suit in the said territories instituted within the said period of sixty years and pending at the date of the passing of this Act, either in a Court of first instance or of appeal, shall be dismissed on the ground that a twelve years' rule of limitation is applicable.

(2) Where in the aforesaid territories, the claim of a mortgagee for foreclosure or for sale has been wholly or in part dismissed or withdrawn after the twenty second day of July 1907, and before the passing of this Act, either in a Court of first instance or of appeal, on the ground that a twelve years' rule of limitation applied to such claim the case may be restored on an application in writing to the Court by which the claim was dismissed or in which it was withdrawn, provided the application is made within six months from the date of the passing of this Act, and on such restoration the provisions of sub section (1) shall apply

247. Object of this section.—The object of the Legislature in framing this section was to obviate the hardship that would otherwise have resulted to mortgagees in consequence of the period of limitation being

to be only twelve years, instead of sixty, which was the period previously applicable to suits of this kind in the scheduled territories—*Srinivasa v. Vasudeva*, 32 Mal 312

"One immediate circumstance which has moved the Government of India to undertake legislation in connection with the Indian Limitation Act, 1877, is the hardship which has been caused to the holders of mortgages of immoveable property, in forms other than what is known as the English form, over a large part of India, by reason of the recent decision of the Judicial Committee of the Privy Council in the case of *Vasudeva v. Srinivasa* (30 Mad 426). In that case their Lordships, overruling the decisions of the High Courts of Bombay, Madras, and Allahabad, have advised that the period of limitation prescribed by the Indian Limitation Act, 1877 for suits to enforce payment of money secured by such mortgages is twelve years as provided in article 132 of the Second Schedule of that Act, and not the larger period of sixty years prescribed by Article 147. In the opinion of the Privy Council the latter article applies only to the class of mortgages in which a suit may be brought for 'foreclosure or sale,' that is, only to English mortgages. Previous to this decision, for nearly a quarter of a century, the law had been held by the High Courts of Bombay [13 Bom 90, 20 Bom 408] and of Allahabad [6 All 551] to be that every suit by a mortgagee either for foreclosure or for sale was governed by the sixty years rule of limitation enacted in Article 147, and the same view of the law had been accepted by the High Court of Madras and by some other High Courts [3 O C 156, 2 C P L R 57]. The effect of the decision of the Privy Council has been that in the territories within the jurisdiction of the above High Courts a number of suits for the enforcement of mortgages, which, before the decision of the Privy Council would have been within time, have been and must be dismissed by the Courts on the ground that they are barred by limitation, and that the claims under a still larger number of mortgages have become unenforceable owing to the construction thus put on the Statute of Limitation. This result is undoubtedly hard on mortgagees who have relied on the view of the law taken by the High Courts of their Provinces and now find themselves debarred of all remedy because that view has been decided to be incorrect. The Government of India are of opinion that some provision should be made to meet these cases, and it is accordingly proposed in the Bill to allow to these mortgagees a period of two years within which to bring their suits, provided that the whole period from the date when the money secured by the mortgage became due does not exceed sixty years in all. Provision is also made for the continuance of pending suits and for the restoration of suits which have been dismissed on the ground of limitation since the date of the Privy Council decision."—*Statement of Objects and Reasons*

Subsection (2) of this section is intended to provide for the restoration

of suits of the description mentioned above which have been dismissed on the ground of limitation since the date of the Privy Council decision. It proceeds on the lines of sec 17 Act VIII of 1861—*Statement of Objects and Reasons*

248 Mortgage —A document is a mortgage within the meaning of this section if it satisfies the requirements of section 58 of the T P Act even though it is executed before the passing of that Act and though it does not contain an express transfer of interest or an express agreement conferring a power of sale—*Venkatarama v Suppanandan* 27 M L J 58

249 Extension of the period of grace —The period of limitation prescribed by this section cannot be extended by the application of section 6 of the Act—*Akhanjan v Bhikan* 18 Ind Cas 306 (Oudh)

It can however be extended by section 4 so that if the period of grace expires on a holiday a suit brought on the re-opening day would be in time See *Murugesu v Ramaswamy* 6 M L J 23 *Heera v Amarti*, 34 All 345 and other cases cited in Note 34 under section 4

The period of grace allowed by this section cannot be extended by excluding the period taken for obtaining a conciliator's certificate—*Dayaram v Larman* 13 Bom L R 284

The period of two years mentioned in this section ended on Monday the 8th August 1910 (the Act being passed on 7th August 1908 and the 7th of August 1910 being a Sunday) The fact that the Act was made applicable to Berar from the 28th August 1908 would not extend the period of two years up to 28th August 1910 in the case of Berar The express words in the section are within two years from the date of the passing of this Act —*Sonba v Moniruddin* 9 N L R 49

250 Appeal —The words whether in a Court of first instance or of appeal show that this section applies to a suit which is pending in the stage of appeal in an Appellate Court—*Birj Mohan v Ram Sarup*, 2 Ind. Cas 632

251 Pending —In a suit for sale on a mortgage instituted in 1899 the High Court held that the sixty years rule of limitation under Art 147 of the Act of 1877 applied and the suit was not barred On appeal the Privy Council in August 1907 reversed the decision of the High Court and declared that Art 132 was the proper Article (see *Vasudeva v Srinivasa* 30 Mad 426 P C) and the case was remitted to the High Court to be disposed of in accordance with such declaration So remitted the case came before the High Court on the 16th August 1908 after the passing of the Limitation Act of 1908 and the High Court that section 31 applied disposed of the suit in favour of the plaintiff defendant therefore appealed to the Privy Council and contended section 31 was not applicable in as much as the suit could not be pending at the time of the passing of the Act of 1908, judgment of the Privy Council remitting the case to the High

the suit It was held, overruling the contention, that the suit was 'pending' at the time of the passing of the Act of 1908, and therefore covered by section 31, and that the judgment of the Privy Council remitting the case to the High Court did not end the suit nor finally determine it, but it was remitted for further procedure and enquiry on allegations of fact, and at the time of the passing of this Act that procedure was not concluded and the enquiry not entered upon, so that the suit was neither adjudged upon nor ready for judgment at the time of the passing of the Act of 1908—*Vasudeva v Sadagopa*, 35 Mad 191 (P C)

252 Revival of right —No right which had already become barred under the old Limitation Act was revived by the introduction of section 31 (1) into the Act of 1908 Where therefore a suit on a mortgage of 1863 was barred under the Acts of 1871 or 1859 this section did not revive that right—*Jai Sing v Surja* 35 All 167, *Ram Dawar v Bhirgu*, 10 A L J 538

32 [Repealed by the Amending and Repealing Act XVII of 1914]

THE FIRST SCHEDULE

(See Section 3)

FIRST DIVISION SUITS

253 The periods of limitation prescribed in this schedule are to be computed subject to the provisions contained in the body of the Act—*Dhonesur v Roy Gooder* 2 Cal 336 (F B)

If a suit falls under two Articles of the Limitation Act the one more general and the other more particular and specific the latter Article will apply on the principle *Generalia specialibus non derogant* (the special excludes the general)—*Sharoop v Jogessur* 26 Cal 564 567 (F B) *Madras Steam Navigation Co v Shalimar Works* 42 Cal 85 (108) *Venkatasubba v Asiatic Steam Navigation Co* 39 Mad 1 (12) *Mangu v Dolhin* 25 Cal 692 *Municipal Board v Goodall* 26 All 482 See Note 6 at p 5 ante

Part I—Thirty days

Description of Suit	Period of limitation.	Time from which period begins to run
1—To contest an award of the Board of Revenue under the Waste Lands (Claims) Act, XXIII of 1863	Thirty days	When the notice of the award is delivered to the plaintiff

Part II—Ninety days

2—For compensation for doing or for omitting to do an act alleged to be in pursuance of any enactment in force for the time being in British India	Ninety days	When the act or omission takes place
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254 Application of Article —This section applies where the defendant professes to do an act *bona fide* in pursuance of an enactment it does not apply where the defendant knows that he has not under a statute autho

nty to do a certain thing and yet knowingly and intentionally does that thing in contravention of the provisions of the Statute—*Ranchordas v Municipal Commissioner* 25 Bom 387 *Maung Kyaw v Maubin Municipality* 3 Rang 268 4 Bur L J 139 A I R 1925 Rang 311 The intention of this Article is to meet those cases where the defendant does an act injurious or possibly injurious to another under powers conferred or honestly believed to be conferred by some Act of the Legislature. It does not apply to a case where the damages arise not from the doing of the act or from the failure to do it but from doing it in an improper manner out of malice and carelessness. Such a case would be governed by Article 36—*Wahulla v Raj Bahadur* 16 O C 211. A suit for damages against a Municipality for malicious prosecution will be governed by this Article if the defendant Municipality has acted in the honest belief that it was empowered to institute the prosecution by the Municipal Act if at the time it instituted those prosecutions the defendant Municipality knew that it had no power to prosecute then the suit would be governed by Article 23—*Maung Kyaw v Maubin Municipality* (supra).

In order to enable a defendant to take advantage of the shorter period of limitation prescribed by this Article he must allege and shew that he had reasonable grounds for justifying his action under the particular enactment relied upon by him and not that he arbitrarily asserted or thought so. He must have assumed to act in the honest exercise of a supposed statutory power—*Ganesh v Elliot* 124 P R 1881 *Narpat Rai v Sardar Krupal* 65 P R 1886 *Punjab Cotton Press Co v Secretary of State* 4 Lah 428. The reasonableness of the belief is immaterial if he honestly believed in the existence of those grounds though it is an important element in determining the question of honesty—*Ganesh v Elliot* 160 P R 1883. A person acting under statutory powers may erroneously exceed the powers given or inadequately discharge the duties imposed by the Statute yet if he acts *bona fide* in order to execute such powers or to discharge such duties he is to be considered as acting in pursuance of the Act and is to be entitled to the protection conferred upon persons whilst so acting—*Smith v Shaw* 10 B & C 277.

This article is not intended to apply only to those cases in which the defendant at the time of doing the act informs the other party in so many words that he is acting under such and such a provision of law. The article being evidently intended to allow protection to persons doing acts in pursuance of some enactment in force it is sufficient for them to show that in doing the act they were at the time under the honest belief that their act was authorised by some Statute—*Richard Watson v Municipal Corporation of Siala* 72 P R 1909.

This Article is wide and general in its terms and must be read subject to the provisions of any specific Article: it should not be applied where there is a more specific Article applicable to the case. Thus it is not

applicable to a suit against a Municipal Board for compensation for illegal or excessive distress such a suit would be more properly governed by Art 28—*Municipal Board v Goodall* 26 All 48

255 Compensation —For the meaning of this word see Note 305 under Article 29 In the cases cited therein it has been pointed out that according to some High Courts the term compensation should be applied to those cases in which the plaintiff does not claim only the specific amount realised by the defendant but a much larger sum by way of damages to be assessed by the Court whereas according to some other Courts the word should be interpreted in a much wider sense and would cover all cases whether the plaintiff asks only for a refund of the specific sum of money realised by the defendant or for damages to be assessed by the Court for the defendant's wrongful act

In *Rajputana Malwa Railway Stores v Ajmere Municipal Board* 32 All 491 the word was applied in the former sense and it was held that a suit to recover the excess amount of duty realised by the defendant Municipality from the plaintiff (and not to recover any damages) was not a suit for compensation under this Article but would fall under Article 62 This case was followed in *Municipal Board v Deokinandan* 36 All 555 12 A L J 952 25 Ind Cas 943

256 Cases —Where a certain Municipality asked the Magistrate to direct the removal of a hut under section 144 of the Criminal Procedure Code on the ground that it was dangerous and insanitary and the Magistrate after a full inquiry on the spot passed an order for demolition it was held that a suit for compensation for damage caused by the order of the Magistrate purporting to be under sec 144 Criminal Procedure Code fell under this Article—*Hari v Surendra* 18 Ind Cas 84 (Cal)

A suit for damages against a Municipality for an alleged omission to repair a road quickly and for closing the road at both ends which injured the business of the plaintiff is governed by this Article—*Municipal Board v Behari Lal* 24 A L J 682 A I R 1926 All 538 65 Ind Cas 1030

In execution of a simple money decree certain immoveable property belonging to the plaintiff was advertised for sale On the date fixed for sale the *amin* came to sell the property Before the sale the plaintiff tendered the decretal amount to the *amin* but the latter wrongfully refused to accept the money and went on with the sale The sale was subsequently set aside on plaintiff's application under O XXI r 89 C P Code The plaintiff brought this action for damages against the *amin* 19 months after the date of sale It was held that the suit fell under Article 2 (and not 36) because the whole foundation of the plaintiff's claim was the alleged omission by the defendant to perform a duty imposed by the C P Code i.e. the omission to accept the decretal amount and stop the sale The suit was therefore barred—*Mukut Lal v Gopal Sarup* 41 All 219 16 A L J 1017 48 Ind Cas 815

Where bricks were wrongfully seized and used by a Municipal Committee, but not in the exercise of any powers conferred upon them by the Municipal Act, a suit to recover the value thereof need not be brought within three months—*Harbhaguan v Hassan*, 79 P R 1884

257 Any enactment in force :—It is not enough for the defendant pleading the Article in bar of a suit to assert that he honestly believed that the Act in pursuance of which the alleged acts were committed, was in force. He must show that the Act was actually in force at the time and place of the acts complained of—*Jai Ram v Gurmukh*, 105 P. R 1886

258 Starting point of limitation —If the damage results to the plaintiff's estate not immediately but after the lapse of some months after the acts of the defendant the accrual of the cause of action is postponed under section 24 until such time as the damage occurs, in such a case the plaintiff's suit must be brought within 90 days from the time when damage accrued to the plaintiff from the defendant's acts—*Richard Watson v Municipal Corporation*, 72 P R 1909. The *terminus a quo* in calculating limitation is the date of the damage and not the date of construction of the work which caused the damage—*Punjab Cotton Press Co v Secretary of State*, 4 Lah 428 (430) and 4 Lah 432

Part III —Six months

3—Under the Specific Relief Act, 1877, section 9, to recover possession of immoveable property.	Six months	When the dispossession occurs
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259 Section 9 of the Specific Relief Act contemplates summary suits to recover possession, independently of any question of title, if a question of title is raised, the suit will not fall under section 9—*Ramasami v Paraman*, 25 Mad 448, and will not be governed by this Article

Therefore, a summary suit to recover possession independently of the question of title must be brought within six months from the date of dispossession—*Grant v Bunshee*, 15 W R 38. If the plaintiff comes in after six months, he can succeed only on proof of some title—*Nand Kishore v Sheo Dyal*, 11 W R 168

Where a non-occupancy rayat has been dispossessed of his holding by his landlord otherwise than in execution of a decree, a suit by the rayat to recover possession by establishment of his title is not a suit under section 9 of the Specific Relief Act, consequently Article 2 cannot apply but either Art 120 or 142—*Tamizuddin v Ashrub Ali*, 31 Cal. 647 (F. B.) (overruling *Bhagabati v Luton Mandal*, 7 C W N, 218)

- 4—Under the Employ- Six When the wages, hire or
 ers and Workmen months price of work claimed
 (Disputes) Act, IX of accrue or accrues due.
 1860, section 1

Part IV—One year

- 5—Under the summary One When the debt or liquidated
 procedure referred to year demand becomes payable
 in section 128 (2) (f) or when the property be-
 of the Code of Civil comes recoverable
 Procedure, 1908, *where*
 the provision of such
 summary procedure
 does not exclude the
 ordinary procedure in
 such suits, and under O
 XXXVII of the said
 Code

Change —The italicised words have been added in Article 5 and the period of limitation has been extended from six months to one year by the Indian Limitation Amendment Act XXX of 1925. The reasons have been thus stated: 'Article 5 of the First Schedule to the Indian Limitation Act 1908 (IX of 1908) provides a period of limitation of six months for a suit under the summary procedure referred to in section 128 (2) (f) from the date on which the debt or liquidated demand becomes payable or when the property becomes recoverable. As the Article stood in the Act of 1877, it referred to suits on negotiable instruments under Ch. 39 of the Code of Civil Procedure of 1882. In the Code of 1908 powers were given in section 128 (2) (f) to High Courts to extend the summary procedure, and a reference to that section was substituted for Chapter 39 of the Civil Procedure Code, when the Limitation Act was consolidated in 1908. The fact that the provisions of chapter 39 of the Code were also retained in Order 37 of the new Code of Civil Procedure seems to have been overlooked. Accordingly if Article 5 is strictly construed, it applies now only to suits under the summary procedure made by rules under sec. 128 (2) (f) of the Code since the Code was enacted. The Bill proposes to make the intention clear, and to make a similar consequential change in Article 159 of the same Schedule. The Bill further proposes to extend the period of limitation now fixed in Article 5 for suits to which the summary procedure applies from six months to one year, as the existing period

has been represented to be too short —*Statement of Objects and Reasons* (Gazette of India 1925 Part V page 181)

This amendment has been made as a result of the recommendation made by the Civil Justice Committee See the Civil Justice Committee Report pp 489 490

This amendment overrules *Rabindra v Abdul Ahad* 52 Cal 954 29 C W N 589 A I R 1925 Cal 781 88 Ind Cas 400 in which it was held that suits under O 37 C P Code were not governed by Article 5

6—Upon a Statute Act, One When the penalty or for
Regulation or Bye law year forfeiture is incurred
for a penalty or forfei-
ture

60 A suit for the recovery of a fine imposed under the terms of a contract or agreement is a suit based on contract and is governed not by Article 6 but by Article 68 or 115—*President of Taluk Board v Lakshmi narayana* 31 Mad 54 see also *Meri Lal v Mukhta* 3 P R 1875

A suit for recovery of profession tax under the Towns Improvement Act (III of 1871) is not governed by this Article the same not being a penalty or forfeiture—*President of Municipal Commission v Padmara* 11 3 Mad 124

This section applies to a suit for penalty under a Statute Act etc a penalty in a bond does not fall under this Article

This section applies to pecuniary penalties and forfeitures therefore a suit for possession of immoveable property to which the plaintiff is entitled by reason of any forfeiture or breach of contract is not governed by this Article but by Article 113

A clause in a lease from the Government entitling the plaintiffs to certain grazing fees and authorising them to impound and levy an extra fee in the case of cattle grazed without permission is a bye law within the meaning of this Article—*Meri Lal v Mukhta* 3 P R 1875

7—For the wages of a One When the wages accrue due
household servant, year
artisan or labourer
not provided for by
this schedule, Article 4

261 Scope —This article is applicable only to a suit for wages brought by a servant against the master and not to a suit brought by one servant against a superior servant who has drawn the wages of the whole establishment from the master and has failed to pay therefrom the portion due to the plaintiff—*Siva Ram v Turnbull* 4 M H C R 43 *Abhaya Charan v Hare Chandra* 13 W R 150

262. *Wages* —The term *wages* is confined to the earnings of labourers and artisans and the word *salary* is used for payment of servants of a higher class—*Gordon v Jennings*, (1882) 9 Q B D 45 A suit by a painter for the price when there is an agreement to pay a certain price for the whole work done upon delivery and acceptance, is not a suit for *wages* under this article—*Virasani v Siyambabay*, 2 M H C R 6

263. *Household servant* —This section does not apply to *all* servants, but only *household* servants A *disardar* in Oudh is not such a servant—*Ghasi Ram v Uma Datt*, 26 O C 327, 9 O L J 348 A cook is a domestic servant, although he may be an expert in cooking, and a suit for wages brought by him is governed by this Article—*Kuppu Rao v Narasier*, 2 L W 723, 28 Ind Cas 956

A wet nurse is not a domestic servant and a suit by her to recover her wages falls under Art 102—*Mohan v Jumerai*, 10 A L J 395

A weighman employed to do work in a shop is not a household servant nor an artisan nor a labourer—*Mutsaddi v Bhagwan*, 48 All 164, 23 A. L. J 1059 (cited below)

A person whose duties are to sweep and clean a temple, provide flowers for daily worship and garlands for the idol is not a household servant—*Bhaskaradon v Rama*, 7 Mad 99, *Baradwaja v Arunachala*, 41 Mad 528, nor is one so whose duty is to instruct in fencing and wrestling—*Pylwan v Jenaka*, 8 M H C R 87

Where a servant is appointed on a fixed monthly salary, the limitation commences from the end of each month and not from the date of the dismissal of the servant—*Kali Churn v Mahomed Saleem*, 6 W R Civ. Ref 33

264. *Artisan* —A mechanical engineer is not an artisan within the meaning of this Article The word 'artisan' in this Article means a mechanic or a workman who has acquired some manual skill, and does not mean persons undertaking higher classes of work which involve responsibility and intellectual training A suit by an engineer for wages would be governed by Article 102—*Navahmal v Mangaldas*, 12 S L R 140

265. *Labourer* —A workman or labourer is one who enters into a contract to employ his personal services and to receive payment for that in wages—*Riley v Ward*, 2 Exch 59 A labourer is a man who digs and does other work of that kind with his hands But a carpenter is not a labourer because though he works with his hand, his work requires skill and training—*Morgan v London General Omnibus Co* (1884) 13 Q B D 832 A labourer is a servant in husbandry or manufacture not living *intra mœnia*, who labours in a toilsome occupation and does work that requires little skill, as distinguished from an artisan (*Bouvier's Law Dictionary*, Vol 2, p 1819). A person who is a contractor or sub contractor and who engages to get work done but does not engage in any work himself is not a workman or labourer—*Gilby v Subbu Pillai*, 7 Mad. 100 A man who agrees, in

consideration of the use of the land and a share of the produce for the season, to provide seed and labour and carry on the cultivation of the land is not a labourer—*Andi Konan v Venkata Subbayan*, 2 M H C R 387
 A weighman employed to work at a shop cannot be treated as a mere labourer employed to do task work, that is to hold the scales and weigh goods in a shop for a monthly salary. He can be asked to do other work of the shop when free. He has to count and add up and calculate the price on the total quantity weighed and his work cannot therefore be treated as purely manual labour. He may be regarded as a shopkeeper's assistant and Article 102 applies to a suit by him to receive his dues from the shopkeeper—*Mutsaddi v Bhagwan*, 48 All 164 23 A L J 1059 A I R 1926 All 172

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| 8—1 or the price of food or drink sold by the keeper of a hotel, tavern or lodging house. | One year | When the food or drink is delivered. |
| 9—For the price of lodging. | One year | When the price becomes payable |
| 10—To enforce a right of pre-emption, whether the right is founded on law or general usage, or on special contract | One year | When the purchaser takes under the sale, sought to be impeached, physical possession of the whole of the property sold or, where the subject of the sale does not admit of physical possession, when the instrument of sale is registered |

266 Scope.—In certain earlier Allahabad cases it was held that the sale referred to in this Article was a sale *ab initio* i.e., an absolute sale having immediate effect and operation and that this Article did not apply to a mortgage by conditional sale which became a sale only on foreclosure. A suit for pre-emption in the latter class of sale was held to be governed by Article 120. See *Nath Prasad v Ram Paltan* 4 All 218 *Rasik Lal v Gajraj* 4 All 414 and *Asik Ali v Mathurakunda* 5 All 187. But this view has been disapproved of in the Full Bench case of *Batul Begum v Mansur Ali* 20 All 315 and should not be taken as correct. This section

therefore applies to a suit for pre-emption when a mortgage by conditional sale is transformed into an absolute sale upon foreclosure

267 Pre-emption —The right to pre-emption arises when the sale becomes complete i.e. when there is an entire cessation of right on the part of the vendor—*Buksha v Tofer*, 20 W R 216 Therefore no right of pre-emption can arise on a mere conditional sale or mortgage so long as the right of redemption remains with the mortgagor—*Goordyal v Rajah Teknarain*, 2 W R 215

The word 'pre-emption' in this Article refers only to those cases in which the vendor has actually *purchased* the property and not to those cases where the intending purchaser has *not yet completed* his purchase because the third column of this Article does not provide a starting point of limitation for a case in which the sale has not taken place Where the intending purchaser has only intended or contracted to purchase the property, a suit for pre-emption (i.e. to enforce the plaintiff's claim to purchase) is governed by Article 120, and the right to sue accrues under that Article when the plaintiff first became aware that the vendor did not intend to sell the land to him—*Rai v Sidahali*, 65 Ind Cas 959, A I R 1922 Nag 14

Where a property has been mortgaged by conditional sale and the mortgagee has been foreclosed, the right of pre-emption arises on the expiry of the period of grace, if the case is governed by Regulation XVII of 1806—*Ali Abbas v Kalka Prasad*, 14 All 405 F B (over ruling *Prag Chaubey v Bhajan*, 4 All 291, *Rasik Lal v Gajraj*, 4 All 414 and *Udit v Padarath*, 8 All 54), *Balul v Mansur*, 20 All 315 (F B) See also *Suba Singh v Mahabir Singh*, 39 All 544 In cases governed by the Transfer of Property Act, the right of pre-emption arises when the mortgagee obtains an order absolute under section 87 of that Act (—O 34, rule 3, C P Code of 1908)—*Raham Illahi v Ghasita*, 20 All 375

When a document was really a deed of sale but was therein called a *hiba-bil-ewas*, it was held to be an instrument of sale within the meaning of this Article—*Wilyat v Hawam*, 3 Ind Cas 590

A perpetual lease is not a sale, and a suit to enforce a right of pre-emption (or pre-lease) in respect of such lease does not fall under this Article but under Article 120—*Mukhlal v Hiranand*, 19 A L J 442, *Gopal v. Lachmi*, A I R 1926 All 549 95 Ind Cas 138

The vendee of a house covenanted to give the vendor and his heirs the first option to purchase the house at a certain price, if he were to sell the house at any time In a suit to enforce this covenant it was held that it was not a suit to enforce a right of pre-emption, but one for specific performance (Art 113)—*Khemchand v Mohan*, 80 Ind Cas 962 (Nag)

268. Physical possession —An undivided share of Zemindari mahal is not capable of physical possession the word 'physical possession' in this Article means personal and immediate possession, regard being had to the form in which the property may exist at the time of the sale, the

period of limitation therefore for a suit to enforce pre-emption in respect of such share must be computed from the date of the registration of the sale deed—*Bahul v Mansur* 24 All 17 (P C) affirming 20 All 315 (F B) *Unkar v Narain* 4 All 24 *Bheli v Imam* 4 All 179 The constructive possession by receipt of rents from the tenants is not physical possession within the meaning of this Article—*Batul v Mansur* 20 All 315 (F B)

A property consisting of a share in a joint estate is not capable of physical possession for until a partition takes place no one has a definite share which he can call his own—*Lahra v Bhagat* 68 P R 1918 *Sohan v Himmat* 61 P R 1885 *Maluk Singh v Muhammad* 65 P R 1889 *Karim v Fazl* 10 P R 1881 *Jowala Singh v Tekchand* 23 P R 1882 *Sardar Ali v Fal* 68 Ind Cas 895 (Lah)

Property (e.g. house shop or agricultural land) which is in the possession of tenants is not capable of immediate and personal possession at the date of sale and therefore limitation commences from the registration of the sale deed—*Panna Lal v Bhagvandas* 16 P R 1902 *Sharif Hussain v Muhammad Yusuf* 88 P R 1905 *Gakhri v Janti* 73 P R 1885 *Ganga Ram v Sardara* 60 P W R 1916 *Ganwa v Joti Prasad* 73 Ind Cas 903 A I R 19 4 Lah 302 *Partab Singh v Gulab* 26 P L R 780 The words capable of physical possession must be construed with reference to the time of sale and has nothing to do with the question whether physical possession is easy of attainment or otherwise or with the nature of the obstruction to the taking of such possession Therefore property held by a tenant at will or a tenant by sufferance cannot be said to be in the physical possession of the vendee although it is easy to take possession from the tenant—*Ghulam Mustafa v Sahabuddin* 49 P R 1908 (F B) And hence when the subject of sale is in the possession of tenants it must be held to be property which is not capable of physical possession at the date of sale and it is immaterial that the property afterwards became capable of physical possession—*Ganwa v Joti Prasad* (supra)

If the property admits of physical possession the period of limitation will commence to run only when the physical possession is actually taken whether the possession is taken at the time of the sale or at some time later. The above rule (viz that the words physical possession must be construed with reference to the date of the sale) must be applied only to property such as an undivided share in a mahal which is by its nature not capable of physical possession and cannot be applied to houses and shops over which physical possession is always possible and practicable Therefore where a house was sold in 1921 but was in the possession of a trespasser at the time of sale and the vendee had to sue him in ejectment and obtained possession in execution of the decree in the ejectment suit in 1922 the period of limitation in respect of a suit for pre-emption of the house commenced to run when the vendee obtained actual possession in 1922

by virtue of the decree in the ejectment suit, and not when the sale-deed was registered in 1921—*Jaganaya v Talsa*, 48 All 12, 23 A L J 885 A, 1 R 1926 All 70, 89 Ind Cas 444

An equity of redemption is not capable of physical possession therefore, on a sale of the mortgagor's equity of redemption to the mortgagee in possession, the pre-emptor's cause of action arises on the date of the registration of the sale-deed—*Shyam Sundar v Amanant* 9 All 234, *Bhawant v Attar*, 68 P R 1884 *Gaffarkhan v Salar*, 160 P R 1889 The word 'possession' means possession as purchaser and not in some other capacity as mortgagee, lessee etc therefore, where a mortgagee in possession purchases the mortgaged property he obtains physical possession within the meaning of this section when the sale to him is actually completed (i.e. when the sale deed is registered) as then his possession which was previously that of a mortgagee becomes that of an owner—*Lachmi v Sheoamber*, 2 All 409

'Physical possession means immediate physical possession, therefore where a certain zemindary property in the possession of mortgagees is sold to the vendee subject to the mortgage, it is not capable of immediate physical possession at the time of sale, limitation for a pre-emption suit runs from the date of registration of the sale deed, and not from the date when the vendee subsequently takes possession from the mortgagees—*Narendra v Wali Muhammad*, 28 Ind Cas 208, 2 O L J 109, *Tikaya Ram v Dharam Chand*, 45 P R 1895, *Viswanathan v Elhirajulu*, 45 M L J. 389

Where the property, at the date of sale, is in the possession of the holder of a particular or intermediate estate e.g. an usufructuary mortgagee or a tenant for a time, the property is not capable of immediate physical possession by the purchaser—*Jairam v Sitaram*, 16 N L R 37 (F B)

Where the whole of the property is not capable of physical possession at the time of sale, the period of limitation commences from the date of registration of the sale-deed—*Umar Baksh v Choghalla*, 156 P R. 1882. The words 'takes physical possession' must be construed as meaning 'takes physical possession of the whole land', where the vendee takes possession of the different portions of the property at different periods, time runs from the last date, when he obtains possession of the whole of the property—*Dewa v. Dia Ram*, 98 P R. 1876

Symbolical possession is not tantamount to physical possession—*Achutananda v Biki Bibr*, 1 Pat 578 (581), A I R 1922 Pat 601, 4 P. L T 277.

Where the property, which was the subject matter of sale, consisted of fractional shares of zemindaries situate in several different *khatas*, it held that the property was not capable of physical possession—*U Beg v. Mukhtar*, 17 A L J. 269.

When the property is not capable of physical possession limitation runs from the registration of the sale deed and not from any subsequent date on which the parties have by mutual consent rectified the wrong description given in the sale deed of the property sold—*Ga ga Rai v Sardara* 1916 1 W R 60. Thus where at the time of mutation the parties to the sale deed agreed that the khasra numbers different from those entered in the deed numbers were intended to be sold and mutation was accordingly effected the starting point of limitation was the date of registration of the sale deed and not the date of the mutation—*Ibid Kah Sha kar v Raghubir* 9 Ind Cas 309 (All)

269 Registered sale deed —A sale certificate granted under sec 316 C P Code (1882) is not an instrument of sale for the purposes of this Article as it does not apply to a sale in execution of a decree even if it be so regarded still a copy of the certificate forwarded to the registering officer in accordance with sec 89 of the Registration Act and duly filed in the register of non testamentary documents relating to immoveable property prescribed in sec 51 of the Act is not a registered document within the meaning of this Article—*Fateh Singh v Dropadi* 142 P R 1908

It is immaterial for the purposes of this Article whether the registration was effected with or without the consent of the vendor. In either case the starting point of limitation is the date of registration—*Nagila Singh v Duni Chand* 62 Ind Cas 797 (Lahore)

Date of registration :—Limitation for a suit for pre-emption depending on registration begins from the date when the certificate required by section 60 of the Registration Act is signed and dated by the registering officer on the document and not from the date on which the document is presented for registration nor from the date when the registering officer signs under sec 59 the endorsements made under sections 52 and 58 of the Act embodying admission of execution—*Kar v Fajal* 10 P R 1881
Bhanjan Ram v Gopal Rai 92 P R 1906

The sale deed was registered at G on 6th October 1921. Only a very small portion of the property sold was situated in G. The rest of the property was situated in B. After registration at G the registration office at B was informed of the registration and an entry was made by the Sub-Registrar of B in his register on the 24th November 1921. Held that limitation began to run from 6th October which was the date of registration and not from 24th November 1921 on which a mere entry was made in the register of B—*Sheopras v Margu* 33 A L J 104 A I R 1925 All 324 86 Ind Cas 130

270 Possession by vendee or pre-emptor before sale —Where prior to the execution and registration of the sale deed actual possession of land was taken by one of the vendees under a convenient arrangement limitation for the purpose of the pre-emption suit ran from the date of

the actual sale (i.e., execution of the sale-deed), and the prior possession of one of the vendees must in law be referred to the subsequent deed of sale—*Ram Pura v Rup Lal*, 30 P R 1918. Where the pre-emptor had already been in possession of the land (originally under an agreement and afterwards as a trespasser) and there was no registered deed of sale, a suit for pre-emption was held to be governed by Article 120 and not by this Article—*Velayudhan v Chinn Velayudhan*, 40 M L J. 443, 62 Ind Cas 27.

In the Punjab, if there is no registered deed of sale, and physical possession is not given because the vendee had already been in possession of the property, but there is mutation of names, the suit for pre-emption is not governed by Article 10 or 120, but by the Punjab Pre-emption Act (sec. 30) and time runs from the date of mutation—*Tola Ram v Lorindra Ram*, 3 Lah. 201.

271. Where Article does not apply.—Where the subject of sale is not capable of physical possession and there is no registered deed of sale, a suit for pre-emption is governed by Art. 120, and not by this Article. Thus, a suit to enforce a right of pre-emption against a mortgagor by conditional sale who has foreclosed is governed by Art. 120, when the property sought to be pre-empted is a share in an undivided zemindari mahal, and there is no registered deed of sale *Batul v Mansur*, 20 All 315 (F B), affirmed on appeal to the Privy Council in *Batul v Mansur*, 24 All 17. *Ali Gauhar v Jawahir*, 30 P R 1892.

Where the property does not admit of physical possession, and being under rupees one hundred in value is conveyed by an unregistered instrument, this article does not apply. See Whitley Stokes' *Anglo Indian Codes*, Vol II, p 277. Where the purchaser has obtained only symbolical possession but no physical possession, and there is no registered deed of sale, the property having been sold in execution of a decree, this Article does not apply—*Achutananda v Biki Bibi*, 1 Pat 578 (581).

A suit by one pre-emptor against another for the determination of the question as to whether the plaintiff or the defendant has the better right to pre-empt the property, is not governed by this Article but by Art. 120—*Durga v Haider*, 7 All 167, *Ilahi Bux v Muhammad Rab Nawaz Khan*, 80 P R 1912, *Ram Pirshad v Ganga Datt*, 20 P R 1908, *Mutsadda v Hamra*, 11 P R 1893. This Article applies to a suit by the pre-emptor against the vendee. A suit against a transferee of the vendee falls under Article 120 and not under this Article—*Karamdad v Ali Muhammad*, 31 P. R 1913 (F B).

272. Right not extinguished—Defence of pre-emption.—A suit by a pre-emptor is not a suit for possession of property in respect of which he has the right of pre-emption, and therefore, the right is not extinguished by operation of section 28. Consequently, a defendant may plead his right of pre-emption by way of defence, though a suit by him to enforce such right.

would then be time barred—*Kanharam Kutti v Utholi*, 13 Mad 490; *Krishna Menon v Kesavan* 20 Mad 305 Contra—*Viswanathan v. Ethirajulu*, 45 M L J 389 *Ramasami v Chinnan Asari*, 24 Mad 449

11 —By a person, against whom any of the following orders has been made, to establish the right which he claims to the property comprised in the order	One year	The date of the order.
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(1) Order under the Code of Civil Procedure, 1908 on a claim preferred to, or an objection made to the attachment of, property attached in execution of a decree,

(2) Order under section 28 of the Presidency Small Cause Courts Act, 1882

This Article and the one following correspond to Art 11 of the Act of 1877 The old Article ran thus,—‘By a person against whom an order is passed under section 280 281, 282 or 335 of the Code of Civil Procedure, to establish his right to, or to the present possession of, the property comprised in the order—One year—The date of the order”

273 Scope of Article —This Article is wider in its scope than the corresponding Article of the old Act A suit contemplated by Article 11 of the old Act was a suit by a person against whom an order was passed under secs 280—282 of the C P Code 1882 (O XXI, rr, 60—62 of the new Code) But Article 11 of the new Act speaks of suit by a person against whom an “order on a claim or objection” was passed, & any order passed in claim proceedings, and is not restricted to an order passed under O XXI, rr 60—62 of the Code Therefore, where upon attachment of the properties of the judgment debtor, a simple mortgagee of the judgment-debtor preferred a petition praying that the properties should be described in the sale proclamation as being subject to the simple mortgage in favour of the petitioner, and the petition being dismissed, he brought a regular

suit to enforce his mortgage more than one year after the order of dismissal it was held that although the objection did not purport to be put in under rule 58, and the order of dismissal was not under rules 60 62 still it was an "order on an objection" and therefore one contemplated by this Article, and the suit by the mortgagee to enforce his mortgage against the execution purchasers and their representatives brought more than a year after the order of dismissal is barred by this Article—*Lakshumanan v Parasivan*, 37 M L J 159 *Velu Padayachi v Arumugam* 38 M L J 397 *Muthia Chetty v Palaniappa* 45 Mad 90 41 M L J 594 70 Ind Cas 432 Contra—*Ganesh v Damoo* 41 Bom 64 (decided under the old Act) in which under exactly similar circumstances it was held that the suit did not fall under this Article

A property mortgaged to A was attached and brought to sale by execution by the defendant and after the sale had taken place A preferred a claim petition that the sale proceeds should be kept in Court deposit to satisfy his mortgage and not be paid over to the defendant The Court dismissed the application holding that as the sale had taken place, it had no jurisdiction to hear the petition In a suit by the plaintiff to enforce his mortgage and recover the mortgage money from the defendant it was held that the suit did not fall under Article 11 but was governed by Article 132, because in this case there was no 'order on a claim or objection' within the meaning of Art 11 The claim was preferred after the sale had already taken place, so that the proceeding was not one under O 21 and the Court had dismissed the claim on the ground that it had no jurisdiction to hear it—*Abdul Kadir v Somasundaram* 43 M L J 467 70 Ind Cas 648 A I R 1923 Mad 76 (distinguishing 41 Mad 985 F B 37 M L J 159 and 38 M L J 397)

This Article applies, even though there had been no attachment in the execution proceedings Thus, in execution of a money decree the Court had ordered the attachment of the property of the judgment debtor, but no attachment was actually made, and it is curious that neither the Court nor the parties were aware of the absence of the attachment The sale-proclamation was duly issued, and a mortgagee of the judgment-debtor preferred a claim petition that the sale should be subject to his mortgage The claim having been dismissed, he brought a suit for sale on his mortgage, more than one year after the date of dismissal, and contended that the claim proceedings being illegal for absence of attachment the order of dismissal of his claim was a nullity and was not required to be displaced by a suit under Article 11 Held that it was the fault of the mortgagee himself not to have satisfied himself by enquiry as to whether there had been an attachment, that the attachment not being essential to the jurisdiction of the Court, its absence was at most an irregularity, that whether or not there has been an attachment, if claimants subject the merits of claims to the Court for investigation, any order passed against a

relief prayed for in the suit (*viz* a declaration) does not take the case out of this Article, as this Article is applicable to all cases in which the main relief (*viz* to establish his right to proceed against the property) asked for falls within its scope—*Venkateswara v Somasundaram*, 1918 M W N 244.

Upon attachment of a property, the claimant preferred a claim that he was in possession of the property under a *moharari* lease granted by the judgment debtor. This claim was allowed and the property was ordered to be sold subject to the *moharari*. More than a year after this order, the decree holder who purchased at the execution sale, brought a suit for a declaration that the *moharari* was fraudulent and *benami*, and for possession and mesne profits. Held that the order of sale being a judicial determination under sec 280 of the Civil Procedure Code, the present suit ought to have been brought within one year from the date of the order, and was barred under this Article—*Rajaram v Raghubansman* 24 Cal 563.

A claimant whose objection is disallowed is bound to bring a suit within one year notwithstanding the fact that he retains his possession, and if he fails to bring a suit, he will be liable to be evicted by the auction-purchaser—*Badri v Muhammad* 1 All 381 (F B). See also *Khub v Ram Lochun* 17 Cal 260.

A certain property being attached in execution, a mortgagee of the property objected to it on the ground that the Court should allow his mortgage to the extent of Rs 164. The Court allowed only Rs 64. It was held that the mortgagee was bound to establish his right to the full amount within one year from the date of the order—*Yashvant v Vitkoba*, 12 Bom 231.

When in execution of a decree against a widow in respect of a mortgage executed by her, the property was attached, and the reversioner's objection to the attachment of the property mortgaged by the widow was disallowed and he sued to have it declared that the mortgage was invalid as against his reversionary interest it was held that this Article applied and the suit was maintainable—*Sant Ram v Ganga Ram* 1904 P L R 122. But it should be noted that if the reversioner had brought no suit under this Article within one year, his right would not have been lost, because under Article 141 the reversioner's right to sue accrues only on the death of the widow. During her life time, he is not bound to make any application for possession, and the fact that he has made an unsuccessful application for possession in the execution proceedings and has not sued under this Article, does not debar him from filing a regular suit after the widow's death—*Tai v Ladu*, 20 Bom 801.

Where, on the date of hearing the claimant failed to produce evidence and wanted time but the Court refused to grant time and dismissed the claim petition, a suit to challenge the validity of the order of dismissal must be brought within one year under this Article, if this is not done, the order would become conclusive—*Gokul v Mohri Bibi*, 40 All 325. *Rahim Bur v Abdul Kader*, 32 Cal 537.

275 Parties to the suit — *Judgment-debtor* — This Article does not apply to a suit by a person who was not a party to the proceedings in which the order sought to be set aside was made. The judgment-debtor is not necessarily a party to the claim proceedings and unless he is a party to the proceedings an order passed therein is not conclusive against him. Therefore a judgment debtor who is not a party to the claim proceedings is not bound by the one year's rule of limitation of this Article in respect of any suit which he may bring for the purpose of establishing his right to the property — *Imbichi v Upakk* 1 Mad 391 *Kedar v Rakhal* 15 Cal 674 *Sadaya v Annurthachari* 34 Mad 533 (134) *Gurava v Subba rayudu* 13 Mad 366

Claimants and decree holders — This Article applies to suits not only by claimants but by decree holders as well. Where after investigation under sec 280 of the Code the release of the property attached was ordered as against the decree holder he is limited to one year within which to sue for a declaration that the property is that of his judgment debtor — *Sardhari v Ambika* 15 Cal 521 (P C). Where the claim proceedings were decided *ex parte* by reason of the decree holder's non appearance notwithstanding that he was given opportunity to appear and produce evidence and an order was made for the release of attachment after an investigation under section 280 it was held that there was an adjudication as to the merits and a regular suit by the decree holder for establishing that the property was that of his judgment debtor must be brought within one year from the date of such order — *Jiwani v Nathumal* 8 P R 1910 1 Ind Cas 890

Assignees — A person who is an assignee of the judgment creditor purchaser in court sale is bound by an order against the judgment creditor in the claim proceedings and a suit by him must be brought within the period prescribed by this Article — *Rama Aiyar v Palaniappa* 35 Mad 35

An assignee from the claimant who has been successful in the claim proceedings in releasing the property from attachment must be made a party in a suit to set aside the order of release if it is intended to bind him by the result of the suit — *Pratap Chandra v Sarat Chandra* 25 C W N 544

276 Property — The word property includes a debt and other intangible property. When a debt not secured by a negotiable instrument is attached a claim can be preferred by a third party and investigated under sec 278 C P Code and an order disallowing the claim is subject to the operation of section 283 C P Code and Art II of the Limitation Act. The words possess and possession in the claim sections of the Code include constructive possession or possession in law of debts and other intangible property and are not restricted to properties which are capable of tangible or physical possession — *Chidambara v Ramasamy* 27 Mad 67

277 Where Article does not apply — This Article does not apply

to a case where subsequent to the order disallowing the claim, the decretal amount is paid off by the judgment-debtor and the attachment released, so that the claimant's interests are not affected. The reason is that as soon as the attachment is removed, there is no longer an attachment or any other proceeding in execution in which the order disallowing the claim could operate to the prejudice of the claimant. As soon as the attachment is released, the parties are restored to their *status quo ante*. The claimant in such a case need not bring a suit under this Article to establish his right to have the property released or a suit under Article 13 to set aside the order passed in the claim proceedings, he can sue to recover possession on ground of title within 12 years—*Manilal v Nathalal*, 45 Bom 561 (565), *Krishna v Bipin*, 31 Cal 228 (231), *Umesh v Raybullubh*, 8 Cal 279, *Ibrahimbhai v Kabulabhai* 13 Bom 72, *Gopal v Bai Divah*, 18 Bom 241. See also *Rati Ram v Behmajit*, 46 All 45 (47). Similarly, a claim preferred to the attachment of property was dismissed for default in 1911. Nevertheless the decree holder took no further steps to bring the attached property to sale, and the execution proceedings were dismissed very soon afterwards for default, whereupon the attachment ceased. In 1918 the decreeholder issued execution against the same lands and purchased them at the auction sale. Thereupon the claimant brought the present title suit. It was contended that the suit was barred under Article 11 as it was not brought within one year after the order of dismissal of the claim case in 1911. Held that the object of making a claim in execution being to remove the attachment, that object was gained when the attachment was withdrawn, and if there existed no attachment or proceeding in execution on which the order in the claim case could take effect, the claimant was not bound to bring a suit complaining of the order of dismissal of the claim, within a year after the order of dismissal. This Article did not apply and the present suit was not barred—*Najimunnessa v Nacharuddin*, 51 Cal 548, 39 C L J 418, A I R 1924 Cal 744. Whether the decree is satisfied or set aside or reversed, or whether the decretal amount is paid into Court under rule 55, or whether the attachment is voluntarily withdrawn by the decree-holder, or whether the order of attachment is discharged, in all these cases the same result follows, viz the attachment of the property is released and the parties are put back in the same position in which they were before the execution proceedings were lodged, and the claimant is not bound to institute a suit under rule 63 within a year after his claim has been rejected, when the object sought by him in making the claim has been attained by the release of the property from attachment within the time limited by this Article—*Ibid*.

Where a mortgagee having attached the mortgaged property in execution of his decree, the property is released at the instance of a third party, the mortgagee is bound to bring a suit within one year for establishing his right to attach and sell the property in execution of his decree, but a suit

by him to establish his lien on the property and to bring it to sale in execution of his decree alleging that the title set up by that third party is a fraudulent one may be brought even after one year as it is not a suit contemplated by sec 283 C P Code and therefore does not fall under this Article—*Bukshi v Sheo Perakash* 12 Cal 453

Where a Court refuses to investigate the claim on the ground that the proper Court for its adjudication is a Court of a higher grade and dismisses the claim petition such an order is not one under O 21 rule 63 and need not be set aside by a suit brought within one year—*Lakshmi Ammal v Kadersan* 41 M L J 198

A debt due to A from B was attached before judgment and A was thereafter adjudged an insolvent. The attached debt was paid into Court and the Official Receiver of A's estate applied to the Court for payment of the money to him and to the attaching creditor by virtue of sec 34 of the Provincial Insolvency Act (1907). The application was dismissed. More than a year afterwards the Official Receiver filed a suit to recover the money. Held that at the time of attachment the Official Receiver had no interest in the money within the meaning of O 21 rule 59 his application therefore was not a claim petition under rules 58 to 63 of Order 21 nor was it an application under any other provision of the C P Code but was a statutory claim under sec 34 of the Prov Insolvency Act. Article 11 therefore did not govern the present suit—*Official Receiver v Veeraraghavan* 45 Mad 70. It should also be noted that Article 11 was inapplicable on the further ground that the Official Receiver's claim was made in proceedings before judgment and not in proceedings in execution of a decree.

This section does not apply to a case where the claimant (who is a purchaser from the judgment debtor) having failed to set aside the attachment of the property claimed by him subsequently brings a suit not against the auction purchaser for the recovery of the property but against the judgment debtor for refund of the consideration money paid by him (claimant) for its purchase—*Rafi Ram v Berhmayit* 46 All 45

Claim in attachment before judgment—This Article applies only to an order passed on a claim or objection made to the attachment of property attached in execution of a decree. It does not apply where the order is passed on a claim to properties sought to be attached before judgment. Such an order on a claim (passed before execution) falls under O 38 rule 8 and need not be set aside like an order under O 21 r 63 and the party against whom such an order is passed is not precluded from asserting his rights to the property in any other proceedings. Neither Art 11 nor Art 13 has any application to such an order—*Ramanamma v Kamaraj* 41 Mad 23 (this case has been overruled by 41 Mad 849 on another point). But if the property is attached before judgment in a suit and is ordered to be sold in execution of the decree subsequently passed in the suit the property may be said to be attached in execution of the decree and a

suit to contest an order passed on a claim preferred in the execution proceedings falls under this Article—*Arunachalam v Periasami* 44 Mad 902 (F B) 70 Ind Cas 439 41 M L J 252

On an attachment before judgment being ordered a claim petition was put in but dismissed on the 28th Feb 1914. Subsequently the proceedings in which the attachment was obtained ended adversely to the attaching creditor in the Court of first instance on the 22nd January 1915 but was reversed on appeal in 1918 thereupon he again attached the property in 1921. Again an objection to the attachment was put in and being dismissed on the 2nd Aug 1921 a suit was filed on the 3rd August 1921 challenging the order. Held that the suit was not barred. The attachment before judgment was withdrawn upon the dismissal of the proceedings by the Court of first instance on the 22nd January 1915 and the reversal of the judgment of dismissal on appeal in 1918 did not operate to revive the attachment which had been cancelled in 1915. And therefore when in the execution proceedings of 1921 a fresh attachment was effected the plaintiff had a right to prefer a fresh claim which was dismissed on 2nd August 1921 and the period of one year should be counted from this date and not from 28th February 1914—*Sailesh v Joy Chandra* 87 Ind Cas 756 A I R 1925 Cal 1147

278 Starting point of limitation —The period of limitation runs from the date of the order. A suit by the claimant for declaration of his title to the property and for recovery of the value of the property where it has been sold prior to the order on the claim petition is in time if brought within one year from the date of the order though after more than one year from the date of the attachment and sale of the property—*Basini Reddi v Ramiyya* 40 Mad 733. Where there has been an appeal against an order passed on the claim petition time runs from the date of the order passed on appeal. The word order should be construed as meaning the only subsisting order in the case which is the appellate order when there has been an appeal—*Venugopal v Venkatasubbiah* 39 Mad 1196

A suit in respect of an adverse order passed under O 21 r 63 against a minor must be brought within one year after attaining majority. If however the guardian files a suit within one year of the order and that suit is dismissed it cannot extend the period of limitation for a suit by the minor—*Subbia v Arunachala* 80 Ind Cas 992

11A —By a person against whom an order has been made under the Code of Civil Procedure, 1908, upon an application by the	One year	The date of the order
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holder of a decree for the possession of immoveable property or by the purchaser of such property sold in execution of a decree, complaining of resistance or obstruction to the delivery of possession thereof or upon an application by any person dispossessed of such property in the delivery of possession thereof to the decree holder or purchaser, to the right which he claims to the present possession of the property comprised in the order	One year	The date of the order
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In the Act of 1877 this Article was included in Article 11 in the present Act it has been separated from that Article and framed more elaborately See the old Article cited under Article 11 *ante*

279 Application of Article —It has been held by the Patna High Court that the language of Article 11A is much more comprehensive than Article 11 of the old Act that this Article is sufficiently wide to cover cases in which the order is passed *without investigation* and there is no justification for restricting the operation of this Article only to those cases where investigation has taken place Therefore where an application under O XXI rule 100 has been dismissed (without investigation) on account of the applicant's failure to adduce evidence on the date of hearing, a suit for declaration of title falls under this Article—*Sayid Rasuddin v Bindeshri Prasad* 5 P L J 652 (655)

But the Calcutta High Court is of opinion that although Article 11A of the Limitation Act does not refer to any section or rule of the Civil Procedure Code and is general in its terms still the order referred to in this Article must be an order under Order 21 rule 103 of the C P Code That rule expressly refers to rules 98 99 and 101 and these rules provide for investigation into a petition of objection The right of suit is given by rule

103 only when there is any order under rules 98, 99 and 101, and Article 11A provides for limitation applicable to such suits. Article 11A therefore does not apply where the petition of objection had been dismissed for *default of appearance*, without any investigation, for an order of dismissal of such petition without investigation is not contemplated by rules 98, 99 and 101 of the O 21 of the Code—*Nirode Barani v Momindra*, 26 C W N 853, 35 C L J 537, A I R 1922 Cal 229, 68 Ind Cas 524. In this case the Judges further pointed out that although the language of O 21, rule 63 of the Code of 1908 has been altered from that of sec 283 of the Code of 1882, the language of secs 332 and 335 of the old Code has been retained in O 21 rule 103 of the Code of 1908, and therefore although Article 11 governs a case in which the claim petition had been dismissed for default of appearance (45 Cal 785), Article 11A cannot apply where the petition of objection made under rule 100 had been dismissed for default of appearance. See also *Sarat v Tarini*, 34 Cal 491 and *Kunj Behary v Kandhu Prasad*, 6 C L J 362 (both decided under the old Act) in which it was similarly held that this Article did not apply to a suit brought by the unsuccessful applicant whose application for possession had been dismissed for default of appearance. See also *Ameeruddin v Rahisa*, 27 Mad 25 (under the old Act) where this Article has been held to be inapplicable where the Court had *refused to investigate* the matter of resistance.

It has been held in another Calcutta case (under the old Act) that where the decree holder gets possession under the decree and is then dispossessed by reason of an order under sec 332 C P Code, a subsequent suit by him for recovery of possession is governed by Article 142 and not by this Article as it contemplates only an order passed under sec 335 C P Code—*Mainsi v Gora Chand*, 16 C W N 971.

Where a purchaser at an auction sale instituted proceedings under s 269 of the Code of 1859 (O 21, r 103 of the present Code) against the defendant who resisted to his taking possession of the property, and the proceedings were dismissed on the ground that the property belonged to the defendant, a subsequent suit to *establish the title* must be brought within one year under this Article—*Bai Jamna v Bai Ichha*, 10 Boni 604. Under similar circumstances a suit to *recover possession* must also be brought within a year after the order—*Ganpat Rai v Husains*, 19 A L J 53, 60 Ind Cas 905.

A purchaser of a coparcener's share at a Court sale, having been obstructed, applied for removal of the obstruction and for possession and his application was rejected. More than a year after the order of rejection, he filed a suit praying that the order in the miscellaneous proceedings might be set aside and that a *partition* might be directed, and that the whole of the plot of land which he purchased might be allotted to the share of his judgment debtor and that he might be placed in present possession of it. *Held* that the suit though in name a suit for partition was in substance

a suit for possession of that very property under the self same right put forward without avail in the miscellaneous proceedings, and so it was a suit to establish his right to the same property covered by the order, and having been brought more than a year after the date of the order in the miscellaneous proceedings which he asked to have set aside, it was barred—*Bhimappa v Irappa* 20 Bom 146 But the Madras High Court holds, under similar circumstances that the suit for partition is not barred by the one year's rule of Article 11A because the claim for partition asked for in the suit is different from the claim for declaration of his title to actual possession which was asked for in the miscellaneous proceedings The plaintiff in the present suit is exercising the equitable right of the coparcener whose share he has purchased to demand a partition at any time The Bombay case was distinguished on the ground that in Bombay even before partition the purchaser of the interest of one coparcener is a tenant in common with the others, but in Madras the purchaser is not a tenant in common but has only an equity to enforce his rights by partition—*Shammugan v Panchali*, 49 Mad 396, 50 M L J 681, A I R 1926 Mad 683, 95 Ind Cas 209

If an execution purchaser asks to be put in actual possession when he is not entitled to such possession, and his application is dismissed under O XXI, r 99 of the C P Code, a suit for actual possession must be brought within one year under this Article—*Baldeo v Kanhaiya Lal*, 16 N L R 103 (P C), 24 C W N 1001, 58 Ind Cas 21

This section applies only to a suit to recover present possession If an objection under section 335 C P Code, preferred by a mortgagee of the property sold in execution is rejected, a suit by the objector to enforce his mortgage lien over the property does not fall under this Article but under Article 132 Such a suit is not a suit to establish the plaintiff's right to the property, but only to recover a debt which is owing to him and as security for which he has got a charge upon the property—*Bhiku v Shujat Ali*, 29 Cal 25 (29)

This section applies to a suit by a person who has been disturbed in his possession by reason of the auction purchaser taking possession of the property If his possession has not been disturbed, and the auction purchaser has obtained only a symbolical possession of the property, he is not required to make an application under O XXI rule 100 asking for possession of the property, when as a matter of fact he remains in possession thereof, and on the dismissal of the application, to bring a suit under this Article Thus, A purchased a property sold in execution of a decree in 1913 and obtained only symbolical possession in 1914 R, who was in possession of the property made an application in 1914, purporting to be under O XXI, rule 100 C P Code, for recovery of possession of the property This application was dismissed on 17th April 1915 on the ground that in as much as the applicant had not been disturbed in his actual possession and in as

much as the auction purchaser had obtained only a symbolical possession, the application was useless. In July 1915, A, the auction purchaser, took away certain crops from the property. Thereupon in July 1917 R instituted a suit for recovery of possession of land, alleging that his possession has been disturbed by the defendant taking away crops from the land. The defendant contended that the suit fell under Article 11A and was barred. *Held* that the plaintiff was not bound to institute any suit under Article 11A within one year from the order dated 17th April 1915, as his possession was not then disturbed by the defendant, that the present suit is not of the nature contemplated by this Article, because the taking away of the crops by the defendant is a cause of action which has arisen *subsequent to the date of the order*, and that the present suit therefore did not fall under this Article and was not barred.—*Ataymon v Ramananda*, 50 Cal 311, A I R 1923 Cal 601, 84 Ind Cas 876.

The plaintiffs purchased certain property in execution of a decree and were put into possession. The defendant applied under O XXI, rule 100 that the property belonged to him and objected to the plaintiffs' taking possession. This application was dismissed for default on two different occasions and was ultimately allowed on the 5th August 1916. In 1900 the plaintiffs brought a suit for possession of the property and urged that as the order of 5th August 1916, allowing the plaintiffs' application after it had been previously dismissed for default was without jurisdiction and a nullity, they could disregard that order and bring a suit for possession within 12 years. *Held*, overruling the contention, that O IX rule 4, which provides for restoration of suits previously dismissed for default of appearance was applicable to a proceeding under O XXI rule 100 and the order restoring and allowing the application (made under O XXI, r 100) previously dismissed for default was not a nullity and could not be ignored and that therefore the present suit fell under this Article and was barred.—*Sheonandan v Debi Lal*, 2 Pat 372, 4 P L T 93, 71 Ind Cas 484, A I R 1923 Pat 239.

The words 'resistance or obstruction' in this Article imply that it applies to those cases where an order has been passed on an application made by the decree holder or purchaser under O 21, rule 97, C P Code, and not where an order has been passed on an application made under rule 95. Thus, on an application by the purchaser at an execution sale under O 21, rule 95 for delivery of possession of property, impleading the sons of the judgment debtor as parties, the Court found that the sons were in possession in their own right and not on behalf of the judgment debtor, and dismissed the application of the purchaser. In a subsequent suit by the purchaser for possession, it was held that as the order dismissing the application of the purchaser was not an order under rule 99 (as there were no allegation and complaint of obstruction or resistance) but was an order passed on an application made under rule 95, the present suit was not one

under rule 103 because rule 103 referred only to an order passed under rules 98, 99 and 101 and not to orders passed under rule 95 and that since rule 103 did not apply the present suit by the purchaser did not fall under Article 11A and was not governed by the one year's rule of limitation—*Sobhas Ram v. Turshet Ram*, 46 All 603, 22 A L J 626, A I R 1924 All 49.

The plaintiff obtained a rent decree against his tenants, and in execution of that decree purchased and took possession of the holding in suit. Meanwhile the tenants had sold away their holding wrongfully to the defendants, and the defendants claiming to possess the property on their own account and not on behalf of the judgment-debtors made an application under O 21 r 100 for restoration of possession. In 1917 order was passed in their favour under O 21 r 101. The plaintiff instituted the present suit in 1920 for ejectment of the defendants on the ground that the tenants had parted with the holding wrongfully. *Held* that the present suit was not one under O 21 rule 103 and was not governed by the one year's rule under Article 11A of the Limitation Act. The suit contemplated by O 21, r 103 is a suit by a person who is kept out of possession of the property purchased in execution of the decree and claims possession *under his auction purchase*. It does not concern itself with any other cause of action which such person apart from his character as auction purchaser may have against the defendant. In the present case the suit is brought by the plaintiff not in his character as auction purchaser but as landlord. The cause of action is not based on the adverse decision against him in proceedings under r 100, but on the transfer by the tenants of their non transferable occupancy holding. The present suit is totally unconnected with the execution proceedings and it does not fall under Article 11A—*Ambik Charan v. Ram Prosad*, 30 C W. N 163, 42 C L J 578, A I R 1924 Cal 377.

280. Parties.—The suit contemplated by this Article is a suit instituted only against the person *in whose favour the order was made*. Therefore, where a suit was filed in time against the party in whose favour the order was made, the mere fact that other persons were added as defendants after the period of limitation on the representation of the defendant that he was only a benamidar for those persons, would not make the suit liable to be dismissed as barred by limitation—*Ayyam v. Poongavanam*, 18 M L J 464.

Similarly, where the suit was brought in time by the person against whom an order under sec 335 was made, and at the hearing it was found that he was only a benamidar, and the second plaintiff was brought on the record as the real owner after the expiry of the period of limitation it was held that the suit was not barred, and that the first plaintiff, though a benamidar, was entitled to sue as the person against whom the order under sec 335 was made—*Venkatachala v. Subramana*, 8 M. L. T. 377.

The words "any person against whom an order has been made" include the *decree holder* (either in his capacity as decree holder for khas possession or as purchaser in execution of his own decree)—*Bhikkari v Abdulla*, 44 All 607, 20 A L J 578 68 Ind Cas 241 *Ganpat Rai v Husain Begum*, 19 A L J 53

§ 12 — To set aside any of the following sales —	One year	When the sale is confirmed, or would otherwise have become final and conclusive had no such suit been brought
(a) sale in execution of a decree of a Civil Court,		
(b) sale in pursuance of a decree or order of a Collector or other officer of revenue,		
(c) sale for arrears of Government revenue, or for any demand recoverable as such arrears		
(d) sale of a patni taluq sold for current arrears of rent		

Explanation — In this article 'patni' includes any intermediate tenure saleable for current arrears of rent

281 Application of Article — This Article applies only to those cases in which the sale would be binding on the plaintiff if not set aside—*Vishnu v Ram Chandra* 11 Bom 130 (132) *Payidanna v Lakshminarasamma* 38 Mad 1076 (1081) *Parekh v Bai Vakkat*, 11 Bom 119 (123)

Article 12 does not therefore apply to void sales. Where a sale is in its inception void it is not necessary for the plaintiff to have it set aside as he is not bound by it—*Ram Narain v Brij Nath*, 29 Cal 36 at p 42 *Purna Chandra v Dinabandhu* 34 Cal 811 (819) F B, *Ahmed Yar Khan v Dinanath*, 42 C L J 69 A I R 1925 Cal 1148, *Khizarajmal v Diani* 32 Cal 296 (315) P C. The words 'set aside' are inapplicable to the case of a sale which is null and void. That which is a nullity cannot from its very nature be set aside—*Shirin Begum v Aghastikhhan*, 18 All 141 (145) Arts 12 and 14 refer to orders and proceedings of a public

functionary to which by law is given a particular effect in favour of one person or against another subject in the regular course to a further judicial proceeding having for its object to quash them or set them aside. When an order does not fall within the authority of an official who makes it it is legally a nullity and therefore need not be set aside—*Si aji v Collector* 11 Bom 429 (432)

Thus where the Court or officer ordering the sale had no jurisdiction to do so as for instance where the Collector brought to sale any property in excess of that which was covered by the decree the sale of the excess share was null and void and the plaintiff's suit for possession of the excess share would not be governed by this Article—*Ma ar Ali v Kedar* 19 All 308. Where a property was sold in execution of a decree in 1882 and there was no interest left to be sold to another purchaser but still it was sold again in execution and thereupon the first purchaser brought a suit for a declaration that the second sale was invalid it was held that there was no occasion for setting aside the second sale which did not at all affect the right of the first purchaser and that therefore this Article did not apply—*Moti v Harrah-uddin* 5 Cal 179 (P C)

The debtor having died the creditor sued the debtor's mother in the character of heir whereas the real heir was the debtor's widow. In 1878 the creditor obtained a decree *ex parte* upon which execution took place and the debtor's property was sold. Afterwards in 1881 the son adopted by the debtor's widow brought a suit to recover the land. Held that the sale being a nullity there was not necessity to set it aside and the suit did not fall under Article 12—*Baswantappa v Ram* 9 Bom 86

Under sec. 49K of the Bengal Tenancy Act the right of an aboriginal tenure holder or raiyat in his tenure or holding cannot be sold in execution of any decree or order the sale of such a tenure is a nullity and an application to set aside such a sale is not governed by Article 12—*Jogeshwar v Jhapal* 51 Cal 224 28 C W N 536 A I R 13 4 Cal 638. Where a sale takes place under the Public Demands Recovery Act (Bengal) without any previous notice to the defaulter the sale is an absolute nullity and a suit to set aside the sale and to recover possession of the property sold is governed by Art 142 and not by this Article or Art 120. In such a suit the plaintiff need not ask that the sale should be set aside he is entitled to recover possession upon the footing that the sale has not affected his title—*Purna v Dinabandhu* 34 Cal 811 at p 821 (I B) (practically overruling *Hari Charan v Chandra Kumar* 34 Cal 787) see also *Syam Lal v Nilmoney* 34 Cal 441 where the suit was held to be governed by Article 95 or 120 and not by Article 12

Thus Article has no application where the suit is to set aside a sale on the ground of fraud. Such a suit is governed by Art 95—*Venkatappa v Subramanya* 9 Mad 457. *Kissen v Roghooindun* 6 W R. *Bhoobun Chunder v Rani Sunder* 3 Cal 300. *Syam Lal v Nilmoney*

Cal 241 *Bajaji v Pirchand*, 13 Bom 221, *Parekh v Bai Vakkat*, 11 Bom 119, *Vaiha v Jodha*, 6 All 406 But see *Raj Chandra v Kinnoo Khan*, 8 Cal 329 where it has been held that a suit to set aside a sale falls under this Article even though fraud is alleged

Where the sale of a property attached takes place subject to a person's claim to the property, he can sue to establish his right to the property at any time within 12 years, this Article not applying to such a case—*Rutneswar v Majeda*, 7 W R 252

Where the plaintiff, a puisne mortgagee, did not seek to set aside the sale held at the instance of the first mortgagee but only sought to participate in the sale proceeds on the ground that the first mortgagee was not entitled to draw the whole amount, the suit did not fall under this Article—*Sivarama v Subramanya* 9 Mad 57

This Article does not apply if the plaintiff was not a party to, and therefore not bound by the proceedings in which the sale was held—*Kally Mohun v Anandmont*, 9 C L R 18 *Venkata v Subbamma*, 4 Mad 178. *Sadagopa v Jamunabhai* 5 Mad 54 The Court has no jurisdiction to sell the property of persons who are not parties to the proceedings or properly represented on the record As against such persons the decrees and sales purporting to be made will be a nullity and may be disregarded without any proceeding to set them aside—*Kharajmal v Daim*, 32 Cal 296 (312) P C Thus, where property belonging to the plaintiff has been sold in execution of a decree against a third party, a suit by the plaintiff for recovery of the property is not governed by Art 12 but by Art 144—*Jwala v Masati*, 26 All 346 *Narasimha v Ramasami*, 18 Mad 478, *Natha v Badri*, 5 All 614 *Hadar Hussain v Hussain Sahib*, 20 Mad 118 F B (overruling *Suryanna v Durgi*, 7 Mad 258), *Sarfuddin v Hansraj*, 15 P R 1912 Where the plaintiff had been a minor at the time of the sale, and had not been properly represented in the proceedings in which the sale was held, a suit by the plaintiff after attaining majority to set aside the sale and to recover the property does not fall under this Article—*Vishnu v Rama Chandra*, 11 Bom 130, *Daji v Dhirajram*, 12 Bom 18, *Payidanna v Lakshminarasamma*, 38 Mad 1076 See also *Rashidunnissa v Muhammad Ismail*, 31 All 572 (P C)

Where a suit was brought to recover money from the defendant who was the *karnavan* of a *tarward*, but it was not alleged in the plaint that the defendant was sued as *karnavan* or that the debt was a *tarwad* debt, a sale of the *tarwad* property in execution of the decree was not binding on the members of the *tarwad*, and this Article does not apply to a suit brought by them to recover the land sold in execution of the decree—*Haji v Atharaman*, 7 Mad 512

Voidable sales —As observed before, this Article will apply to cases in which a sale would be binding on a plaintiff if not set aside, i e., where the sale is merely voidable and not void *ab initio* Thus, it applies to a suit to

set aside a sale when there was a defect in the sale notification—*Bajjnath v Moharaja* 6 C L J 163 or where the sale took place within 30 days from the sale proclamation—*Tasadduk v Ahmed* 21 Cal 66 (P C) *Kohil v Edal* 31 Cal 385 or where the plaintiff's lands were sold by the Revenue Court for arrears of assessment whereas in fact the lands were exempt from payment of assessment—*Mahadevi v Sadashu* 2 Bom L R 1082 If a Court erroneously holds that an application for execution is not barred and orders a sale such order though erroneous and liable to be set aside is not a nullity but remains in full force until set aside and a sale held thereunder would be valid till set aside A suit to annul such a sale falls under this Article—*Mohamed Hossein v Purandur* 11 Cal 787 (192) Where a decree was passed against the judgment debtor and after his death an application for execution was made against his estate and against a person as heir who was in fact not the heir but the Court erroneously decided that he was the heir and the property was sold without notice to the proper heirs held that though the execution proceeded against a wrong person still since it was made against the estate of the deceased judgment debtor and since the Court decided though wrongly that the person proceeded against was the real heir the sale was not a nullity and could not be treated as invalid notwithstanding this irregularity though a material one The jurisdiction of the Court was not destroyed by this error Therefore the sale was merely voidable and a suit to set aside the sale falls under this Article—*Malkarjun v Narkari* 25 Bom 337 (P C)

If a decree holder having been refused permission by the Court to bid for or purchase the property to be sold under his decree nevertheless purchases it through a *benamidar* its effect is to render the sale voidable and not void Consequently a suit to set aside the sale must be brought within one year under this Article—*Rai Radha Krishna v Bisheswar* 1 Pat 733 (P C) 3 P L T 529 67 Ind Cas 914

Where a house not included in the mortgage was sold by mistake in execution of a decree on the mortgage the sale is not an absolute nullity but voidable only therefore a suit to set aside the sale falls under this Article—*Nagabhatta v Nagappa* 46 Bom 914 24 Bom L R 423 67 Ind Cas 857, A I R 1923 Bom 62

Where notwithstanding the attainment of majority *pendente lite* by the minor defendant the suit was continued as if he was still a minor and a decree was passed against him and his property was sold in execution it was held that neither the decree nor the sale was a nullity and a suit to set aside the sale must be brought by him within a year after the date of the sale under this Article—*Seshagiri v Hanumantha Rao* 39 Mad 1031

282 Suit for declaration, possession or other relief —Where the real object of the suit is to set aside an execution sale though ostensibly there is a prayer for possession and declaration of title this Article will

apply—*Ram Kant v Kalee* 22 W R 84 The one year's limitation prescribed by this Article is not confined only to suits brought to set aside a sale, but applies also to suits where other relief is sought which can only be granted on annulment of the sale—*Malkarjun v Narhari*, 25 Bom 337 (P C) at page 352

If a suit is not expressly brought for setting aside a sale, but if it is of such a nature that it cannot succeed without the sale being set aside, it will be governed by this Article, e g a suit by an auction purchaser for refund of the purchase money—*Mahomed v Nabroji* 10 Bom 214 (217) A suit for possession of property sold in execution of a valid decree is governed by this Article because the plaintiff cannot ignore the decree but must get it set aside before he can recover possession—*Imam Din v Puran Chand*, 1 Lah 27, *Parshadi v Mohammad Zainulabdin*, 5 All 573

A property was sold by auction in execution of a decree; but before confirmation of sale the judgment-debtor sold the property to another (the plaintiff) who paid the decree money and got the sale set aside In appeal the sale was confirmed and the auction-purchaser obtained possession Thereafter the plaintiff sued the auction purchaser for possession of the property It was held that this Article governed the suit because he must first get the sale set aside—*Nagina Singh v Puran*, 11 P R 1906

Where plaintiff's land having been sold by the revenue authorities for default of payment of assessment due thereon, he instituted a suit for possession, held that the sale being in pursuance of an order of a Revenue Officer, the plaintiff was bound by that sale unless and until it was reversed His suit for possession was governed by this Article, since he could not get possession without setting aside the sale—*Bajays v Pirchand*, 13 Bom 221

A decree was obtained upon a mortgage against a Vitakshara father (mortgagor), but his sons were not made parties in the suit The mortgaged property was purchased by the mortgagee who obtained possession in 1900 In 1911, the mortgagor's sons sued for accounts and for redemption It was held that as the suit for redemption was not maintainable without first getting a declaration that the sale should be set aside, and the limitation for the latter suit was one year under this article, the present suit was barred—*Bhola v Lala Kali Prasad*, 1 P L J. 180, following *Ram Taran v Rameswar*, 11 C W N 1078 Where a mortgagee purchases the mortgaged property at an execution sale held under a money decree of a third person, and the sale is liable to be set aside for some irregularity, a suit for redemption of the mortgage is not maintainable before getting the sale cancelled by a suit under this Article—*Malkarjun v Narhari*, 25 Bom 337 (P C)

Where the plaintiff's interest in a certain land has been sold under the Madras Rent Recovery Act, a suit for possession of the same cannot

succeed without setting aside the sale and would therefore fall within this Article—*Ragaendra v Haruppa* 30 Mad 33

283 When the sale is confirmed —If the sale is not confirmed this Article does not apply—*Varasinha v Ramasami* 18 Mad 478 (479)

Where the Board of Revenue discharged an order of the Commissioner dated January 1884 which had confirmed a sale by the Collector held in 188 but afterwards on the 21st August 1886 reversed its own order and revived that of the Commissioner it was held that the confirmation of sale dated only from August 21st 1886 and that a suit to set aside the sale brought within one year from that date was not barred—*Bajjnath v Rairat* 23 Cal 775 (P C)

A sale having been effected by order of a Deputy Collector an appeal was made to the Collector who set aside the sale The Commissioner, however set aside the order of the Collector It was held that the sale did not become confirmed or final and conclusive before the date of the Commissioner's order—*Pyan Nath v Troylucko* 14 W R 284

Under this Article time begins to run from the date of the confirmation of the sale only in those cases in which such confirmation is required by the law under which the sale is held and in other cases from the date on which the sale becomes otherwise final and conclusive by the law under which it is held Thus a sale held under the Bengal Patni Taluq Regulation (VIII of 1819) does not require confirmation it becomes final and conclusive on payment of the full amount of purchase money Therefore a suit to set aside such a sale must be brought within one year from the date of the payment of the purchase money and not from the date of a superfluous order of confirmation nor from the date of the issue of a certificate of payment—*Bhuban v Girish* 13 C L J 339 10 Ind Cas 87 In the Madras Estates Land Act, there is no provision for the confirmation of a sale held under that Act consequently the period of limitation is to be counted from the date when the sale would otherwise have become final and conclusive A sale under the Madras Estates Land Act becomes final 30 days after the date of sale, in the absence of any application made under sec 131 of that Act to set aside the sale—*Kamulammal v Chokkalingam* 45 M L J 840 A I R 1925 Mad 278 76 Ind Cas 840

284 Effect of limitation —Though the right of a person to set aside the sale of a property (which is still in his possession) may be time barred under this Article still there is nothing to prevent him from setting up the invalidity of the sale as a defence to a suit brought by the plaintiff to recover possession of the property from him—*Venkatachalapathi v Robert Fischer*, 30 Mad 444 *Mahadev v Sadashiv* 45 Bom 45 The Calcutta High Court, however, holds that such defence is not available—*Ramsona v Nabokumar*, 16 C W N 805

13—To alter or set aside a decision or order of a Civil Court in any proceeding other than a suit	One year	The date of the final decision or order in the case by a Court competent to determine it finally
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285 Scope of Article —A suit for recovery of the proceeds of a sale in execution alleged to have been drawn out by the defendant by virtue of an order of a Civil Court is governed by this Article—*Dwarka Nath v Roy Dhunput* 17 W R 227

Where the suit is framed as one for possession but the plaintiff cannot get a decree for possession without first having the order set aside the suit is really a suit to cancel the order and is governed by this Article—*Kishori Lal v Kuber* 33 All 93 7 A L J 937 7 Ind Cas 503

If the order is passed by a Court which is not competent to pass it it is a nullity and the plaintiff need not bring a suit under this Article for cancelment of the order but may sue for a substantial relief—*Ram Kishan v Bhawan Das* 1 All 333 (F B)

If a Court passes an order releasing certain properties from attachment before judgment a suit by the plaintiff for a declaration that the properties are liable to attachment is not governed by this Article because it is not necessary for the plaintiff to set aside the order before he can sue for the declaration prayed for—*Ramanamma v Kamaraju* 41 Mad 23

Where the order of the Court had already ceased to have any binding effect, no suit is necessary to be brought under this Article to set aside the order. Thus during the course of an execution proceeding the Court decided that the attached property belonged to the defendant, and that it was attachable in execution of a money decree against the defendant and that the plaintiff had no title to the property as the purchase of that property by the plaintiff was invalid. Then the plaintiff deposited the decretal amount in Court and the property was released from attachment. Thereafter he instituted a suit for a declaration of his title to the property based on the ground that the purchase of the property by him was valid and not void. Held that the suit did not fall under this Article the decision of the Court ceased to have any valid and binding effect when the attachment was set aside by payment into Court of the decretal amount by the plaintiff therefore it is quite unnecessary for him to have that order set aside and the suit for a declaration is not barred by this Article—*Lal Shaha v Kado Mahto* 6 P L J 85 (F B)

A suit to set aside a sale of ancestral property, made by the plaintiff's guardians after taking the sanction of the District Judge, and for recovery of plaintiff's share therein, is not a suit to set aside an order of a Civil Court under Art 13 (because the sanction of the Judge is not an order), but is governed by Art 147—*Sikher v Dulputty*, 5 Cal 363

A suit not to set aside an order but for an injunction restraining the defendant from enforcing the order, on the ground of error and illegality in the proceedings, is not governed by this Article—*Dhuromidhar v Agra Bank*, 5 Cal 86

A certificate of heirship only confers the right of management of the property and does not determine the title to the property, therefore if the person to whom such a certificate has been refused seeks to recover the property on the basis of his title, he need not bring a suit under this Article to set aside the order granting the certificate to the defendant, but he may sue the holder of the certificate for the possession of the property, and the suit will be governed by the rule of limitation respecting the possession of property—*Bai Kashi v Bai Jamna*, 10 Bom 449 If the party who fails to get a succession certificate seeks to set aside the order granting the certificate to the defendant, he must bring his suit within one year from the date of that order But if he does not care to disturb that order, a suit to obtain possession of the property of the deceased upon proof of his title need not be brought within one year from the date of the order—*Kales Prosunno v. Koylash Monce*, 8 W R 126 The same remarks apply also to orders passed under Act XIX of 1841. If a party seeks to set aside a summary order passed by a Civil Court under Act XIX of 1841, he must bring his suit within a year from the date of the Judge's order, but if he prefers to leave that order alone, he is not debarred from bringing a suit for possession upon proof of his title within the period prescribed for the institution of suits for immoveable property viz 12 years—*Moncedunissa v Mahomed Ali*, 1 W. R. 40, *Lokenarain v Rani Moyna Koer*, 7 W R 199 (F B)

A receiver appointed by the Court under the provisions of the Provincial Insolvency Act is not a Court, he is merely an officer of the Court, consequently this Article does not apply to a suit to set aside the Receiver's order—*Basodi v Lala Muhammed*, 13 N. L. R 210

286. Proceeding other than a suit.—All proceedings in execution are proceedings in suit; this Article is therefore inapplicable to a suit to set aside an order passed in such proceedings—*Ayyasami v. Sannya*, 8 Mad. 82, *Sital v. Mohan*, 3 O. C. 84, *Official Receiver v. Veeraraghavan*, 45 Mad 70 at p 76 (dissenting from *Kishori Lal v Kuber Singh*, 33 All 93 where an execution proceeding was held to be a proceeding other than a suit) Orders passed in miscellaneous applications in the course of execution proceedings are not governed by Article 13 This Article relates to orders passed in disputes which did not begin with the filing of plaint in a suit, such as disputes initiated by applications under the Guardians and Wards Act, the Succession Certificate Act, and so on, such applications and the proceedings connected with such applications being not proceedings in suit—*Shankur v Mejo Mal*, 23 All 313 (P. C) A suit by the plaintiff to recover the sale proceeds paid to the defendant under an order of the Court passed under section 295 of the C P Code, 1882 (section 73 of the Code of 1908),

is governed by this Article because the order for distribution is an order in the suit itself and therefore a proceeding in a suit—*Shankur v Mejomal* 23 All 313 (P C) *Vishnu v Achut* 15 Bom 438 (dissenting from *Gaur v Ram Ratan* 13 Cal 159) *Stvarama v Subramaniya* 9 Mad 57 *Sohan Lal v Baldeo* 1895 P R 65

287 Final decision of a competent Court — Order by a Court competent to determine it finally means the final decision of a Court which has competent jurisdiction to decide the case finally and does not include the order of an Appellate Court rejecting an appeal on the ground of want of jurisdiction—*Oleoumssa v Buldeo* 7 W R 151

14.—To set aside any act or order of an officer of Government in his official capacity, not here in otherwise expressly provided for	One year	The date of the act or order
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288 Void act or order —This Article does not apply to a case where the order of the officer is null and void This Article refers to acts or orders done in the exercise of powers legally exercisable by the executive in other words the Article applies to those acts or orders which require to be set aside It has no application where jurisdiction has been usurped and the order is *ultra vires* An order made without jurisdiction is a nullity and need not be set aside to an order of this description Article 14 has no application—*Peary Lal v Secretary of State* 39 C L J 454 A I R 1924 Cal 913 83 Ind Cas 446 *Shivaji v Collector* 11 Bom 429 *Dhargis v Secretary of State* 45 Bom 920 *Rasulkhan v Secretary of State* 39 Bom 494 *Balvart v Secretary of State* 29 Bom 480 *Malkajappa v Secretary of State* 36 Bom 325 *Secretary of State v Gula* 1 *Mahabub* 42 Mad 673 *Ananda Kishore v Dargi Thakurain* 36 Cal 726 *Magbul v Hara Govinda* 8 C L J 410 *Birbar Narayan v Secretary of State* 14 C L J 151 *Wasif Ali Mirza v Saradindu* 29 C W N 839 There fore where a Collector who can under sec 48 of Bengal Act VI of 18,0 only settle *Chaukidars Chikran* lands with the Zemindar within whose estate the lands be ordered the lands to be settled with the defendant who was the Zemindar of adjacent lands and the plaintiff who was the proprietor of the estate in which the lands lay brought a suit for possession it was held that this Article did not apply as the order was an absolute nullity and need not be set aside—*Bijoy Chand v Kristo Mohini* 21 Cal 626

The power of a criminal Court with regard to property dealt with under section 524 of the Criminal Procedure Code is limited to making arrangements for the custody and protection of the property That section does not empower the Government to confiscate the property

Such an order of confiscation being illegal and without jurisdiction, the plaintiff's suit for recovery of possession is not barred by reason of his omission to institute a suit under this Article within one year of the order for the purpose of setting it aside—*Secretary of State v Loan Karan*, 5 P L J 321

Where a person who was entitled to the possession of a village, in pursuance of an order of the Collector, was put into possession of a wrong village, by reason of a mistake having been made as to the village mentioned in the order, the act done under a mistake of fact was a nullity, and a suit by the plaintiff for possession of the right village was not governed by this Article—*Maharaja of Vajjanagram v Satrucheria*, 30 Mad 280 Where land belonging to the plaintiff was entered as Government waste land in the Revenue Survey Register by order of the Revenue Commissioner who afterwards gave the land to the defendant, purporting to act under sec 37 Bombay Land Revenue Code, a suit by the plaintiff to recover possession was not governed by this Article as the order was *ultra vires* (because sec. 37 does not give power to dispose of lands of private individuals) and the plaintiff was not bound to set it aside—*Surannanna v Secretary of State*, 24 Bom 435 Where a Collector passes an order under section 37 of the Bombay Land Revenue Code with reference to land which is *prima facie* the property of a private individual, and not of the Government, the order is a nullity because sec 37 of the Land Revenue Code does not give power to deal with the lands of private individuals The Collector is acting *ultra vires* and there is no occasion for this Article to apply—*Malkajappa v Secretary of State*, 36 Bom 325

Where the notice required under sec 10 of Bengal Act VII of 1880 (Public Demands Recovery Act) was not served, and in execution of the certificate the judgment debtor's property was sold, it was held that the whole of the proceedings which resulted in the sale was invalid and that a suit to set aside such a sale did not come under this Article but was governed by Art 120—*Saroda v Kisto*, 1 C W N 516 A Collector in a partition proceeding under the Bengal Estates Partition Act (VIII of 1876) can only adopt one of two courses, if an objection is taken that a certain plot of land does not appertain to the estate under partition. he may either strike off the partition, or proceed with it treating the disputed land as part of the estate So, where a Collector merely passed an order excluding the disputed lands from the partition, the order of the Collector was *ultra vires*, and therefore a nullity, and a suit brought by the plaintiff for a declaration of his right to those lands was not subject to the limitation under Art 14—*Alimuddin v Ishan*, 33 Cal 693. Where a Collector purporting to act under the Bengal Estates Partition Act (V of 1897) passed an order refusing to put a party to a partition in possession of the land allotted to him, held that the order was one for which there was no provision of the law, and consequently Article 14 did not apply to a suit to set aside the order

and recover the land—*Wasif Ali Mirza v Saradindu*, 29 C W N 839, A I R 1925 Cal 953

A temporary alienation of a portion of the inam lands by a trustee, although it is beyond the power of the trustee, does not amount to a violation of the conditions of the grant, and does not justify an order of resumption of the grant by the Government. Such an order of resumption is a nullity and does not require to be set aside under this Article, and a suit by the trustee for a declaration that the resumption is invalid and for recovery of possession of the inam properties from the Government would be governed by Art 144—*Secretary of State v Gulam Mahabub*, 42 Mad 673

Where the order of the Collector, not being referable to any statutory provision or any rule which has the force of law, is *ultra vires*, the plaintiff need not bring a suit for setting aside the Collector's order, but may sue for a declaration or other relief, and this Article does not apply—*Paldaya v Secretary of State* 48 Bom 61, 25 Bom L R 1160

An order by which land belonging to the plaintiffs was given by the Collector to others without any warrant of law, is an absolute nullity, and need not be set aside under this Article. The plaintiffs can bring a suit for possession of the land—*Rajan Kant v Ram Dulal*, 17 C W N. 55

289 Suits under this Article.—This Article applies where the order is binding on the plaintiff if not set aside. Thus, in a partition proceeding before the Collector under the Estates Partition Act, the plaintiff contended that certain land measured as part of the estate under partition was not part of the estate but appertained to his *howla*. The Revenue authorities enquired into his contention under sec 116 of the Act and decided it against him. More than a year afterwards, the plaintiff brought a suit for a declaration that the disputed land was part of his *howla*. Held that the Revenue authorities had jurisdiction to enquire into his plea, hence the plaintiff was bound by their order and the present suit not being brought within one year from the date of the order was barred under this Article—*Parbati v Raj Mohan*, 29 Cal 367. A suit for cancellation or modification of rent settled by a Settlement Officer having jurisdiction to settle the rent, is governed by this Article, although the suit is in the guise of one for the modification of the certificate of rent granted by the officer—*Ashnosh v Abdul*, 29 Cal 676. Where the act or order of the Government officer is not a nullity, it is binding on the plaintiff unless and until it is set aside, and a suit by the plaintiff, even though it is framed as a suit for possession or for declaration, would be governed by this Article. Thus, a suit for a declaration that the plaintiff is entitled to hold the land free of the assessment and for recovery of the assessment collected by the Government, is governed by this Article, as the plaintiff is not entitled to the declaration without getting the Collector's order set aside—*Subanna v Secretary of State*, 1915 M. W. N. 915. Where on an appli-

cation by the plaintiff for redemption under the Punjab Redemption of Mortgages Act (II of 1913) the Collector passed an order that the mortgage had ceased to exist and redemption was barred a suit by the plaintiff to redeem the mortgage is eventually a suit to set aside the Collector's order and falls under Article 14 therefore it is barred if brought more than a year after the date of the Collector's order—*Haura v Ram Chand* 6 Lah 206 6 P L R 383 88 Ind Cas 945 Where an auction purchaser at an execution sale held by a Collector which was subsequently ordered to be set aside brought a suit for a declaration that the order setting aside the sale be declared ineffectual and for possession of the property it was held that the suit was in effect one to set aside the order though there were not the precise words in the prayer and that it was governed by Art 14—*Raghunath v Kari* 24 All 467 A suit under sec 83 of the C P Land Revenue Act for the amendment of settlement entries is not a suit for a declaration that the entries are erroneous but a suit for nullifying something which an officer of Government has done and is governed by Article 14 and not by Article 120—*Onkar Lal v Shaligram* 3 N L J 190 A I R 1922 Nag 6 A suit for possession of land on the ground that it was plaintiff's property and that the grant of a lease thereof by the Collector to the defendant for building purposes under section 37 of the Bombay Land Revenue Code was not proper is governed by this Article because the Collector's order leasing the land to the defendant is binding on the plaintiff unless it is set aside—*Vagu v Salu* 15 Bom 4-4

On the 6th May 1911 an order was made by the Collector declaring that a survey number belonging to the plaintiff be forfeited to Government for arrears due on the *khata* Against the order of forfeiture the plaintiff preferred an appeal to the Commissioner The appeal being dismissed the plaintiff filed a suit on the 14th October 1913 to get the order of forfeiture set aside It was contended that the time taken up in appealing to the Commissioner be excluded in reckoning the period of limitation Held overruling the contention that the suit was barred by limitation as it was not brought within one year from the date of the Collector's order of forfeiture—*Ganesh v Secretary of State*, 44 Bom 451

290 Suits not under this Article —Where the object of a suit is not to have any of the orders of the Revenue officer set aside but the plaintiff merely asks for a declaration and it is not necessary for him to have any order set aside to enable him to get relief Article 14 can have no application e g a suit under section 109 of the Bengal Tenancy Act for a declaration that an undisputed entry in the *Khawats* and *Khiltan* is erroneous—*Agin Bindh v Mohan Bikram* 30 Cal 6 (27)

The demarcation of land as *peramboke* does not necessarily interfere with the possession of the owner consequently the order under which such demarcation is made need not be set aside under this Article, but

the plaintiff can sue for possession within 12 years from the date when he is actually dispossessed—*Krishnamma v Achayya*, 2 Mad 306

Where the plaintiff was not a *party* to the order of the Collector passed under sec 116 of the Bengal Estates Partition Act, he will not be affected by the order, and is not bound to set it aside by a suit brought under this Article, he can sue for possession of the land—*Laloo Singh v Purna Chandet*, 24 Cal 149

Where the Revenue Officer rejected the plaintiff's application for partition of a *shamlat*, a suit for a declaration of his title to a share therein is governed by Art 120. As the Revenue officer had no jurisdiction to decide the question of title, and as this suit is not one for setting aside his order, Art 14 is not applicable to the suit—*Kalu Khan v Umda*, 47 P. R 1916.

The Civil Court has no power to set aside an order passed by the Revenue Authorities under the Land Registration Act, therefore no suit lies in a Civil Court to set aside such order. If, however, a suit is brought to have such order set aside and for a declaration of the plaintiff's right and title to a certain property, *held* that the prayer to have the order set aside must be treated as a surplusage, that the suit is one simply for declaration of the plaintiff's title in respect of the property, and that this Article does not apply—*Luchmon Sahas v Kanchun*, 10 Cal 525.

In a partition proceeding under the Bengal Estates Partition Act a dispute arose as to whether certain plots of land were included in the property to be partitioned, and upon enquiry the Collector passed an order under sec 115 of that Act, directing that the partition proceedings be struck off. Four years after, the plaintiffs brought a suit for possession of certain plots of land on declaration of title thereto. *Held* that the suit was not governed by this Article, as it was brought not to have the order of the Collector set aside but to obtain possession of certain lands. The order of the Collector staying and striking off the partition proceedings until the parties had had the matter in dispute between them decided by a Court of competent jurisdiction, could not be regarded as in any way standing in the way of the plaintiffs obtaining the relief which they claim in the suit, and it was therefore unnecessary for the plaintiffs to have that order set aside—*Raychandra v. Fazluddin*, 32 Cal 716. The plaintiff attempted to take possession of certain lands allotted to him in Batwara proceedings (under the Bengal Estates Partition Act, 1897) but he was resisted by the defendant who was in possession of those lands, and this led to criminal proceedings in the Magistrate's Court. The plaintiff was referred to assert his right in the Civil Court and he brought a suit for possession of those lands. *Held* that the suit did not fall under this Article, as it was not a suit to set aside any order of the Revenue Officer (on the other hand it was a suit based on the order of the Revenue Officer allotting certain lands to the plaintiff). It was simply an action in ejectment, its main purpose being to recover possession of certain lands allotted to the plain-

suff—*Dhakeshwar v Gulab Korr*, 7 P L T 483 (P C) 53 I A 176, A I R 1906 P C 60

291. Act or order of Government officer —A Judge exercising his judicial functions is a Civil Court and not a Government Officer acting in his official capacity within the meaning of Art 14—*Gobindabala v Ganu* 10 Bom L R 749

Where an objection under section 103A of the Bengal Tenancy Act to an entry in the Draft Record of Rights has been rejected by the Revenue Officer, such rejection has no finality and cannot be said to be an order of a Government Officer within the meaning of this Article—*Ram Golam v Bishnu*, 11 C W N 48

So also an order of the Collector under sec 3 (5) of the Madras Estates Land Act is a temporary or provisional order and no finality is given to it. The order will *ipso facto* be vacated whenever a Civil Court pronounces on the rights of the contending parties and need not be set aside within one year under this Article—*Pannisami v Chellasami* 1921 M W N 193 62 Ind Cas 276

Certain lands in a village were held on *khoti* tenure by the defendants, and the plaintiffs were the *khotis* of the village. A Survey Settlement Officer decided in 1882 that the lands held by the defendants were *dhara* lands of the defendants and in 1889 an entry to that effect was made in the Survey Register. Meanwhile in 1887 the plaintiffs brought the present suit for a declaration that the lands in dispute were their *khoti* lands. Held, that the decision of the Survey Settlement Officer in 1882 was not an order because section 21 of the Khoti Settlement Act (Bombay Act I of 1820) does not contemplate an 'order' being made by the Survey Officer between the parties. Even if the framing of the register be regarded as an act of the Survey Officer, that act was not done until 1889, nearly two years after the suit. The suit is not therefore affected by Article 14 of the Limitation Act. It falls under Article 120 and is not barred, being brought within six years from 1882—*Fahf v Sajnah*, 18 Bom 244

292 When time runs —Time runs from the date of the order, and not from the date of the final order in appeal confirming the original order—*Chaturbhuj v Secretary of State*, 22 Bom L R 146. See also *Ganesh v Secretary of State*, 44 Bom 451, cited *ante*

15 —Against Government	One	When the attachment,
to set aside any attachment, lease or transfer of immoveable property by the revenue authorities for arrears of Government revenue.	year	lease or transfer is made

292A When a *ghatwal* becomes a defaulter, the Government can transfer the tenure to some other person. A suit to set aside the transfer in such a case is governed by this Article—*Chitra Narain v Assistant Commissioner*, 14 W R 203

16—Against Government to recover money paid under protest in satisfaction of a claim made by the revenue authorities on account of arrears of revenue or on account of demands recoverable as such arrears	One year.	When the payment is made
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293 Application of Article—Where penal assessment was levied for unauthorised occupation of Government land, and this amount had been paid under coercion, a suit to recover the amount so paid would be subject to the one year's rule of limitation under Art 14 or Art 16—*Meera v Secretary of State* 13 M L J 269

Where a person pays water cess under protest on a demand being made by the Government for alleged unauthorised use of water belonging to Government and then brings a suit for the recovery of the water cess illegally levied by the Government the suit does not fall under sec 59 of the Madras Revenue Recovery Act, because the mere demand of the water-cess by the Government does not amount to a proceeding under that Act, and the person making the payment cannot be said to be a person 'aggrieved by a proceeding within the meaning of sec 59 of that Act. The suit falls under Article 16 of the Limitation Act—*Secretary of State v Venkatratnam*, 46 Mad 488 (at pp 501 502) 45 M L J 12, A I R 1923 Mad 652 (dissenting from *Orr v Secretary of State* 23 Mad 571), *Secretary of State v Nagaraja*, 44 M L J 645, 74 Ind Cas 281, A I R 1913 Mad 665, *Ravula Vengala Reddi v Secretary of State*, 46 Mad 502 (Foot note) 15 Ind Cas 328, *Puchalapalli Pichu Reddi v Secretary of State*, 70 Ind Cas 884, 46 Mad 503 (Foot note), *Rawala Nagamma v Secretary of State*, 1913 M W N 75 18 Ind Cas 699, *Secretary of State v Rangarayakamma* 12 L W 334, 59 Ind Cas 98, *Pilchayya v Secretary of State*, 21 L W 155, A I R 1925 Mad 474

Actual formal protest is not necessary every time the payment is made. An objection to the Collector against payment of Revenue assessment, followed by a fruitless appeal to the Commissioner would constitute sufficient protest, and subsequent payments, though made without any further

protest would fall within the description of money paid under protest — *Kebul Ram v Government* 5 W R 47 (per Selous Kerr J) But Macpherson J held in this case that the subsequent payments did not amount to payments made under protest

Where a person has paid several years assessment under protest he can only recover the payment for the last of such years under this Article — *Bhujai g v Collector of Belgaum* 11 B H C R 1 *Kebul Ram v Government* 5 W R 47 *Secretary of State v Ranganayakamma* 12 L W 334 59 Ind Cas 98 But he may sue to set aside the order of the Collector within six years under Article 110 — *Kebul Ram v Government* 5 W R 47 or he can bring a suit to establish his right to hold the land free of assessment within 12 years from the time when his right was first interfered with — *Bhujai g v Collector of Belgaum* 11 B H C R 1

17 — Against Government	One	The date of determining
for compensation for	year	the amount of the com
land acquired for pub		pensation
lic purposes		

294 Art 17 has no application where the amount of compensation has not been determined Where the Collector refuses to award any compensation for the land acquired on the ground that the plaintiff is not entitled to any compensation a suit to recover compensation would be governed by Art 110 and not by this Article — *Rameswar Singh v Secretary of State* 34 Cal 40

This Article is confined to a suit against Government it does not apply to a suit by a person who is entitled to compensation awarded by Government against a person who has wrongfully received it — *Vund Lal v Mir Abu* 5 Cal 597 Article 62 would govern such a suit

The old Land Acquisition Act X of 1870 did not provide for or contemplate an award for compensation being enforced against the Collector by execution proceedings and there was no general law which enabled a Civil Court to enforce the award by means of execution proceedings The ordinary mode of enforcing an award was by a suit against the Collector and such suit was governed by Article 17 of the Limitation Act — *Nilkanth v Collector of Fhaia* 22 Bom 80 (F B) at p 807

18 — Like suit for com	One year	The date of the refusal to
pensation when the		complete
acquisition is not com		
pleted		

295 Art 18 applies to suits for compensation for damages suffered by the owner by reason of the Government's withdrawing from acquisition (See section 48 of the Land Acquisition Act I of 1894)

292A When a *ghatwal* becomes a defaulter, the Government can transfer the tenure to some other person. A suit to set aside the transfer in such a case is governed by this Article—*Chitra Narain v Assistant Commissioner*, 14 W. R. 203

16.—Against Government to recover money paid under protest in satisfaction of a claim made by the revenue-authorities on account of arrears of revenue or on account of demands recoverable as such arrears.	One year.	When the payment is made.
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293. Application of Article —Where penal assessment was levied for unauthorised occupation of Government land, and this amount had been paid under coercion, a suit to recover the amount so paid would be subject to the one year's rule of limitation under Art 14 or Art 16—*Mecra v Secretary of State*, 13 M. L. J. 269

Where a person pays water cess under protest on a demand being made by the Government for alleged unauthorised use of water belonging to Government, and then brings a suit for the recovery of the water cess illegally levied by the Government, the suit does not fall under sec 59 of the Madras Revenue Recovery Act, because the mere demand of the water-cess by the Government does not amount to a proceeding under that Act, and the person making the payment cannot be said to be a person 'aggrieved by a proceeding' within the meaning of sec 59 of that Act. The suit falls under Article 16 of the Limitation Act—*Secretary of State v Venkatratnam*, 46 Mad 488 (at pp 501, 502) 45 M. L. J. 12, A. I. R. 1923 Mad 652 (dissenting from *Orr v Secretary of State*, 23 Mad 571); *Secretary of State v. Nagaraja*, 44 M. L. J. 645, 74 Ind Cas 281, A. I. R. 1923 Mad 665; *Ravula Vengala Reddi v Secretary of State*, 46 Mad 502 (Foot note), 15 Ind Cas 328. *Puchalapalli Pichu Reddi v Secretary of State*, 70 Ind. Cas 884, 46 Mad 503 (Foot note). *Rawala Nagamma v Secretary of State*, 1913 M. W. N. 75, 18 Ind. Cas 699; *Secretary of State v. Rangarayakamma*, 12 L. W. 334, 59 Ind Cas 98; *Pitchayya v Secretary of State*, 21 L. W. 155, A. I. R. 1925 Mad 474

Actual formal protest is not necessary every time the payment is made. An objection to the Collector against payment of Revenue assessment, followed by a fruitless appeal to the Commissioner would constitute sufficient protest; and subsequent payments, though made without any further

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Where a person has paid several years assessment under protest he can only recover the payment for the last of such years under this Article — *Bhujang v Collector of Belgaum* 11 B H C R 1 *Kebul Ram v Government* 5 W R 47 *Secretary of State v Ranganayakam* 12 L W 334 59 Ind Cas 98 But he may sue to set aside the order of the Collector within six years under Article 120 — *Kebul Ram v Government* 5 W R 47 or he can bring a suit to establish his right to hold the land free of assessment within 12 years from the time when his right was first interfered with — *Bhujang v Collector of Belgaum* 11 B H C R 1

17 — Against Government	One	The date of determining
for compensation for	year	the amount of the com-
land acquired for pub		pensation
lic purposes		

294 Art 17 has no application where the amount of compensation has not been determined Where the Collector refuses to award any compensation for the land required on the ground that the plaintiff is not entitled to any compensation a suit to recover compensation would be governed by Art 10 and not by this Article — *Rajeswar Singh v Secretary of State* 34 Cal 40

This Article is confined to a suit against Government it does not apply to a suit by a person who is entitled to compensation awarded by Government against a person who has wrongfully received it — *Nasir Lal v Mir Abu* 5 Cal 597 Article 62 would govern such a suit

The old Land Acquisition Act of 1870 did not provide for or contemplate an award for compensation being enforced against the Collector by execution proceedings and there was no general law which enabled a Civil Court to enforce the award by means of execution proceedings The ordinary mode of enforcing an award was by a suit against the Collector and such suit was governed by Article 17 of the Limitation Act — *Nikhant v Collector of Thana* 22 Bom 80 (F B) at p 807

18 — Like suit for com	One year	The date of the refusal to
pensation when the		complete
acquisition is not com		
pleted		

295 Art 18 applies to suits for compensation for damages suffered by the owner by reason of the Government's withdrawing from acquisition (See section 48 of the Land Acquisition Act I of 1894)

But where the acquisition has been completed and the Collector refuses to award any compensation, a suit to recover compensation is governed by Art 120—*Rameswar v Secretary of State*, 34 Cal 470 The plaintiff's land was taken by the Government for railway purposes and the Collector took possession of it before an award was made He however refused to pass an award in as much as he held that the land was Government land and that in consequence no compensation was payable to the plaintiffs The plaintiffs brought a suit for declaration of title, and for possession or in the alternative for damages for the wrongful refusal of the Collector to make an award stating the amount of compensation payable to them Held that as the land had already vested in the Government the plaintiffs were not entitled to recover possession or to a declaration of title but that they were entitled to claim damages for breach of statutory duty on the Collector's part (*viz* refusal to make an award), the measure of damages being such compensation as would have been recovered by the plaintiffs if the Collector had made an award and the suit was governed by Article 120 Article 18 which applies to a suit for compensation when the acquisition is completed could not apply as in this case the acquisition had been completed in this sense that the property had absolutely vested in the Government—*Mankaravadi v Secretary of State* 27 Mad 535

19 —For compensation for One year When the imprisonment
false imprisonment ends

296 Imprisonment —Imprisonment amounts to total restraint of liberty for some period however short. A partial restraint as the prevention from going in one direction or in all directions but one, will not constitute an imprisonment—*Bird v Jones*, (1845) 7 Q B 742 Nothing short of actual detention and complete loss of freedom will support an action for false imprisonment A person who is released on bail can no longer be regarded as under imprisonment so long as he is on bail, his imprisonment ends there, and the period of limitation for an action for false imprisonment begins to run from the date on which he was enlarged on bail—*Mahammad Yusufuddin v Secretary of State*, 30 Cal 872 (P C)

In a case of false imprisonment, the question arises who is liable for the imprisonment?—the party who takes out the warrant or the Court which issued the warrant? The principle is that when a Court acts within its jurisdiction but erroneously, then the party who takes out the warrant is not liable, but when the Court has no jurisdiction to issue the warrant, the whole proceeding is *coram non judge*, and the party is liable In this case, two officers of the Court by mistake in spite of the decree having been already completely satisfied issued a certificate of nonpayment of the judgment-debt and a writ of arrest of the judgment-debtor The Court had jurisdiction over the matter, and therefore the liability fell upon the

two officers (and therefore upon the Court), because the proceedings which ended in the wrongful arrest arose from some fault on their part—*Fisher v Pearse*, 9 Bom 1

A suit for damages for false imprisonment or malicious prosecution, even though it is brought against several joint tort feorsors is governed by the one year's rule under Article 19 or 23. The fact that there are several tort feorsors and that there was a conspiracy between them does not constitute a distinct cause of action by itself, so as to take the case out of this Article. A tort when committed by several individuals is not different from the same tort committed by a single individual. A malicious prosecution is a malicious prosecution, whether it is brought about by one person or by more. The combination in such cases may be an element of aggravation in the assessment of damages but does not make it a different tort. The Legislature has made a general provision that suits for damages for false imprisonment or malicious prosecution must be brought within a certain period, and no distinction is made in respect of the number of persons by whom the wrong may have been perpetrated—*Weston v Peary Mohan Das*, 40 Cal 898 (at pp 949, 951, 952)

Limitation runs from the time when the imprisonment *ends*, and not from the *date of imprisonment*, as erroneously remarked by Scott J in *Fisher v Pearse*, 9 Bom 1 (at p 9)

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| 20—By executors, administrators or representatives under the Legal Representatives' Suits Act, XII of 1855 | One year | The date of the death of the person wronged |
| 21—By executors, administrators or representatives under the Indian Fatal Accidents Act, XIII of 1855 | One year | The date of the death of the person killed. |

297 The word 'representative' in this Article and in Act XIII of 1855 does not mean only executors or administrators but includes all or any of the persons (*e g* widow, children) for whose benefit a suit may be brought under that Act, and it makes no difference whether the deceased was a European or a Eurasian—*Johnson v Madras Railway Company*, 28 Mad 479 (481)

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|---|----------|------------------------------|
| 22.—For compensation for any other injury to the person | One year | When the injury is committed |
|---|----------|------------------------------|

298 A suit for damages or compensation for injury caused to a person's reputation and for mental pain arising out of an assault is governed by Art 22 and not by Article 36, because the cause of action is the injury to the person caused by the assault, and the insult arising from assault does not constitute a separate cause of action. Assault itself is the cause of action though damages may be awarded for the resulting insult—*Arhat v Baldeo*, 5 Ind Cas 124 (125)

A suit for damages for personal injury caused by throwing sulphuric acid on the face is governed by this Article and not by Article 36, because the case is specially provided for by Article 22. Time begins to run from the date of the injurious act done, and the continuance of the effect up to a later time does not make the wrong a continuing wrong giving rise to a continuous cause of action under sec 23, sec 24 also would not extend the period, because the cause of action arose as soon as the sulphuric acid was thrown, irrespective of any subsequent specific injury—*Abdulla v Abdulla*, 25 Bom L R 1333 A I R 1924 Bom 290

23 —For compensation for	One year	When the plaintiff is ac-
a malicious prosecu-		quitted or the prosecu-
tion		tion is otherwise termi-
		nated.

See *Weston v Peary Mohan*, 40 Cal 898 cited under Art 19

299 Prosecution —A statement made to the Police against the plaintiff, which is afterwards found to be false, in consequence of which no action is taken by the Magistrate, is not a ground for an action for malicious prosecution but may constitute libel or slander—*Ishri v Muhammad*, 24 All 368

When proceedings are taken against a person under the Bengal Disorderly Houses Act, it cannot be said that he has been prosecuted, therefore a suit for damages in respect of the proceedings is not one for malicious prosecution under this Article. The suit falls under Article 24—*Dhirajbala v Gopalchandra*, 18 C L J 352

300. Starting point of limitation —In a suit for damages for malicious prosecution, time begins to run from the date of the acquittal, and not from the dismissal of a revision petition by the High Court against the acquittal—*Narayya v Seshayya*, 23 Mad 24. Similarly, where the plaintiff was discharged, his cause of action for a suit for damages for malicious prosecution would arise immediately on his being discharged (since the discharge of an accused person is the termination of the prosecution) and would not be suspended because further proceedings might be taken by way of revision petition to the High Court either by the Government or by the complainant in order to get the order of discharge set aside—*Purshotam v Raju*, 47 Bom 28, 24 Bom L R 507, A I R 1922 Bom 209. It should be noted that in these two cases (23 Mad 24 and 47 Bom 28) the

criminal proceedings were not revived as a result of the revision petition but on the other hand the revision petition was dismissed so that the Magistrate's order of discharge or acquittal might be said to have terminated the proceedings and limitation therefore ran from the date of that order. But where the Magistrate passed an order of discharge and the complainant moved the District Magistrate in revision who *directed further inquiry* but on further application the High Court set aside the District Magistrate's order and altered the order of the first Court into an order of acquittal whereupon the accused brought a suit for damages for malicious prosecution *held* that time ran from the date of the order of the High Court and not from the date of the first Court's order because owing to the proceedings resulting in an order for further inquiry the *prosecution was revived* and did not terminate until the passing of the order of the High Court—*Tanguturi Srinamulu v Vireesalingam* 57 Ind Cas 635 (at p 636). And so it has been observed in the Bombay case cited above. No doubt if a revisional application is successful and the criminal proceedings are directed to be continued then there is no longer any cause of action because the plaintiff is no longer a discharged person and he has to wait until the prosecution terminates in his favour before his cause of action arises again — *Purushottam v Ravi* 47 Bom 28 (at p 30).

If the plaintiff (accused) is convicted by the Magistrate but is acquitted on appeal limitation will run from the date of acquittal on appeal—*Hussain v Naimuddin* 20 Cal 41.

Limitation runs from the date of actual acquittal or discharge by the Magistrate as it appears from the records of the case and not from any earlier date on which the Court expressed an opinion that there was no case to put the accused on trial and that he should be discharged—*Shippu v Sivarama* 1912 M W N 951.

Where an accused is discharged in the middle of the case *before the prosecution as a whole terminates* without any formal order of acquittal or discharge the date of the judgment afterwards pronounced and not the date of the discharge would be the starting point of limitation—*Venkatramana v Swami Nank* 17 M L J 60.

Where the prosecution is dropped when in the hands of the Police the case never coming before a Magistrate the starting point of limitation would be the date on which the prosecution is dropped. The ruling in *Bhyrub Chunder v Mohendra* 13 W R 118 (decided under the Act of 1871) in which it was held that limitation ran from the date on which information was first laid before the Police against the plaintiff is no longer good law by reason of the addition of the words *or the prosecution is otherwise terminated* in the Acts of 1877 and 1908.

24 —For compensation for libel	One year.	When the libel is published
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298 A suit for damages or compensation for injury caused to a person's reputation and for mental pain arising out of an assault is governed by Art 22 and not by Article 36, because the cause of action is the injury to the person caused by the assault, and the insult arising from assault does not constitute a separate cause of action. Assault itself is the cause of action though damages may be awarded for the resulting insult—*Arhat v Baldeo*, 5 Ind Cas 124 (125)

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23 —For compensation for	One year	When the plaintiff is ac-
a malicious prosecu-		quitted or the prosecu-
tion		tion is otherwise termi-
		nated.

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criminal proceedings were not revived as a result of the revision petition but on the other hand the revision petition was dismissed so that the Magistrate's order of discharge or acquittal might be said to have terminated the proceedings and limitation therefore ran from the date of that order. But where the Magistrate passed an order of discharge and the complainant moved the District Magistrate in revision who directed further inquiry but on further application the High Court set aside the District Magistrate's order and altered the order of the first Court into an order of acquittal whereupon the accused brought a suit for damages for malicious prosecution held that time ran from the date of the order of the High Court and not from the date of the first Court's order because owing to the proceedings resulting in an order for further inquiry the prosecution was revived and did not terminate until the passing of the order of the High Court—*Tasgulturi Sriyamulu v Viresalingam* 57 Ind Cas 635 (at p 636). And so it has been observed in the Bombay case cited above. No doubt if a revisional application is successful and the criminal proceedings are directed to be continued then there is no longer any cause of action because the plaintiff is no longer a discharged person and he has to wait until the prosecution terminates in his favour before his cause of action arises again — *Purushottam v Ravi* 47 Bom 28 (at p 30).

If the plaintiff (accused) is convicted by the Magistrate but is acquitted on appeal limitation will run from the date of acquittal on appeal—*Hussain Mohan v Naumuddin* 70 Cal 41.

Limitation runs from the date of actual acquittal or discharge by the Magistrate as it appears from the records of the case and not from any earlier date on which the Court expressed an opinion that there was no case to put the accused on trial and that he should be discharged—*Shripur v Sivarama* 1912 M W N 951.

Where an accused is discharged in the middle of the case before the prosecution as a whole terminates without any formal order of acquittal or discharge the date of the judgment afterwards pronounced and not the date of the discharge would be the starting point of limitation—*Venkatramana v Swami Nask* 17 M L J 60.

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24 —For compensation for libel	One year.	When the libel is published
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See 24 All. 368 and 18 C L. J. 352 cited under Article 23.

301. Limitation runs from the date when the libel is published. But it is not necessary that all or the first of the publications should have been within a year, it is sufficient if any one publication is proved to have been within one year—*Duke of Brunswick v Harmer*, 14 Q B 185

25.—For compensation for slander.	One year.	When the words are spoken, or, if the words are not actionable in themselves, when the special damage com- plained of results.
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302. Special damage —When words defamatory in themselves and not mere verbal abuse, were uttered, an action will lie for damages, though no *special damage* is proved to have been suffered by the plaintiff—*Sukhan v Biped*, 34 Cal 48, *Shoobhagee v Bokhari*, 4 C L J 390; *Jogeswar v. Dinaram*, 3 C L J 140, *Ibin v Haidar*, 12 Cal 109 (the head note of this case is mis-leading, read the body of the judgment), *Troilokya v. Chundra*, 12 Cal 424 per Ghosb J in *Giris v Jatadhari*, 26 Cal 653

The English law of slander, which draws a distinction between words actionable *per se* and words requiring proof of actual or special damage, is not applicable to this country, the law of British India recognises personal insult conveyed by abusive language as actionable *per se* without proof of special damage—*Dawan v Mahip*, 10 All 425. (Contra—*Girish v. Jatadhari*, 26 Cal 653)

But within the local limits of the town of Calcutta, the English law would apply, and slanderous words alone without proof of special damage are not actionable—*Bhoons v Natobar*, 28 Cal 452.

Where A used words which imputed unchastity to the wife of B, the words were defamatory not only of the wife of B, but also of B himself and B was therefore entitled to sue on his own account—*Sukhan v Biped*, 34 Cal 48

26 —For compensation for loss of service occa- sioned by the seduction of the plaintiff's ser- vant or daughter.	One year	When the loss occurs.
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303. If the daughter had been married but deserted by her husband, and was under her father's protection and performing household duties for him, he had by law and custom a right to the service of the daughter, and a suit by him was maintainable for the loss of his daughter's service

through seduction—*Ram Lall v Tula Ram* 4 All 97 (*per* Stuart C J)
But Oldfield J held in this case that such a suit was not maintainable
by a Hindu father

- 27 —For compensation for One The date of the breach
inducing a person to year
break a contract with
the plaintiff

The plaintiff and defendant were rival transport contractors to the
British Government in connection with certain military operations the
defendant improperly enticed the jamadars of the plaintiff into breaking
their contracts by putting the camels which they had contracted to supply
to the plaintiff at the disposition of the defendant *Hatch*
v Shaik Panda 96 Ind Cas. 887 (P C), 4 I R 1926 P C 88

- 28 —For compensation for One The date of the distress
an illegal, irregular or year
excessive distress

304 For a full discussion as to the meaning of the word compensa-
tion see Note 35 under the next Article It has been held in a Bombay
case that where the suit was to recover the amount that was illegally
levied in excess the suit was not governed by this Article but by Art 62
—*Ladji v Musabi* 10 Bom 665 No reason has been assigned for the
inapplicability of this Article but probably the learned Judge interpreted
the word 'compensation' in its narrower sense (*i e* in the sense of
damages)

A suit against a Municipal Board for compensation for illegal or exces-
sive distress is governed by the specific provisions of this Article and not
by Article 2 (which is more general)—*Municipal Board v Goodall*, 26
All 482

A suit against a landlord for compensation for illegal distraint of crops
is governed by Art 28 or 29—*Jagatiban v Sarat* 7 C W N 728

Where an illegal distraint was made by a landlord under Madras Rent
Recovery Act VIII of 1865 a suit for compensation brought within one year
of the distraint was in time—*Yamuna Bai v Solayya* 24 Mad 339

- 29 —For compensation for One The date of the seizure
wrongful seizure of year
moveable property un-
der legal process •

305 Compensation —In *Murugesu v Jallaram*, 23 Mad 621 (626) it has been held that the word compensation must be interpreted in its wider sense, so as to include a claim to recover the value of the goods seized, as well as a claim by way of damages independent of the value of the goods and is not restricted to the latter class of claim alone. See also *Yellaminal v Ayyappa* 38 Mad 972 (at p 984 per Sadasiva Aiyar J) and *Narasimha v Gangaraju* 31 Mad 431 (433) where the same opinion was expressed. Similarly in *Jagjivan v Gulam Jilani*, 8 Bom 17, it was held that a suit simply to recover the money wrongfully taken under a decree was a suit for compensation under this Article, and so in *Venkatachellum v Nagappa*, 23 M L J 519 this Article was held to be applicable to a suit for refund of sale proceeds realized by sale of plaintiff's property by wrongful attachment.

But the Calcutta and Allahabad High Courts are of opinion that the word compensation presupposes that the plaintiff must have been damaged, and the suit must be by way of damages: a suit by the plaintiff merely to recover the money wrongfully attached and taken away by the defendant in execution of the latter's decree against a third party is not a suit for compensation under this Article but is governed by Article 62—*Lakshmi Priya v Ramakanta* 30 Cal 440 (dissenting from 8 Bom 17), *Nisadar Singh v Ganga Dei* 38 All 676 (dissenting from 8 Bom 17). See also *Rajputana Malwa Railway Stores v Ajmere Municipal Board*, 32 All 491, and *Municipal Board v Deokinandan* 36 All 555 (cited under Article 2) and *Yellaminal v Ayyappa* 38 Mad 972 (per Sundara Aiyer J at p 976) where the word has been applied only to a claim for damages.

306 Wrongful seizure of moveable property —Where a warrant of attachment was executed by affixing the Court seal to the outer door of the warehouse where the goods were stored, without breaking open the door and taking physical possession of the goods inside, this was held to be in effect an actual seizure, and a suit for damages for such seizure fell under Art. 29—*Multan Chand v Bank of Madras*, 27 Mad 346.

The word 'seizure' means the taking of something out of the possession of its owner. Where the moveable property (money) was in the custody of the Court and the Court distributed it among the judgment creditors of the owner, there was no 'seizure' within the meaning of this Article—*Ram Varain v Brij Banke*, 39 All 322 (329), 15 A L J 295 39 Ind Cas 532, *Rupabai v Audimulam*, 11 Mad 345. *Rajaram v Mulchand*, 7 N L J 140, A I R 1914 Nag 248.

An attachment of a debt is not a seizure. Seizure involves something in the nature of a transfer of possession. The attachment of a debt is made by a written order prohibiting the creditor from receiving the debt and the debtor from making payment thereof, until the further order of the Court (see O 21 rule 46 C P Code). No transfer of possession is

contemplated by the prohibitory order—*Yellammal v Ayappa* 38 Mad 972 (987)

The word seizure means taking hostile possession and not taking possession of what another voluntarily gives. Therefore where a debt is attached and the debtor makes a voluntary payment of the debt into Court such payment does not constitute a seizure. Hence if the amount of debt is paid by the Court to the decreeholder a suit by the claimant of the debt against the decreeholder is governed by either Art 62 or 120—*Yellammal v Ayappa* 38 Mad 972 (974-987) 26 M L J 166 22 Ind Cas 80. In this case it has been further held (at page 974) that a debt not being a moveable property the attachment of a debt is not a seizure of moveable property under this Article.

Where the defendants had brought a suit against the plaintiffs for sums due to them on account of maritime necessaries supplied to the plaintiffs' ship and obtained an warrant of arrest of the ship but the suit was afterwards dismissed for want of jurisdiction held that the arrest of the ship was a seizure under legal process. The fact that the suit was dismissed for want of jurisdiction did not render the order for arrest a nullity. The seizure was therefore under a legal process—*Madras Steam Navigation Co Ltd v Shalimar Works Ltd* 42 Cal 85 (108)

A suit by the holder of a hypothecation-decree based on a bond hypothecating certain timber against a simple money decree holder for compensation for wrongful attachment and sale of the timber in execution of the latter's decree is governed by this Article—*Bindrahan v Gajadhar*, 3 O C 340

A suit for damages for detention of the plaintiff's cattle which were seized in execution of the defendant's decree against a third party falls under this Article—*Ram Sing v Bholtra* 24 W R 298. *Tejoo Patel v, Mahomedals* 7 C P L R 77

Art 29 is not limited in its application to cases in which the seizure is intrinsically wrongful as for instance where it is made without jurisdiction it applies also to cases where the foundation of the claim is that the defendant procured the seizure of the plaintiff's property under a perfectly legal process but by misrepresentations to Court—*Sekkolingam v Krishnaswami* 38 M L J 324 55 Ind Cas 786 1920 M W N 192

Where a seizure is under a writ of Court it is *prima facie* not wrongful and unless it is shown that the Court issuing the writ had no jurisdiction over the subject matter or that the writ was against a person not a party to the decree a suit for compensation for the seizure would not fall within Art 29. A mere improper attachment is not wrongful attachment—*Aryan Biswas v Abdul* 35 C L J 480, 64 Ind Cas 513. The attachment by the decreeholder of the properties of his judgment debtor is not wrongful by reason of the fact that the vendor of those properties has got a lien on them for his unpaid purchase money. The judgment-creditors are no

under any obligation to enquire at the time of attachment whether the purchase money due to the vendor has or has not been paid. The seizure is perfectly lawful—*Ram Narain v Brij Banke* 39 All 322 (328)

The attachment of the debtors property by the creditor before judgment is a lawful seizure if a decree is afterwards passed in favour of the creditor. The seizure is not wrongful by reason of the fact that it has been effected before the decree. Since the suit is subsequently decreed, the attachment to all intents and purposes must be deemed to have been effected in execution of the decree—*Ram Narain v Brij Banke*, 39 All 322 (at p 328) *Manga v Changa Mal* 22 A L J 977, A I R 1925 All 131. If the suit in which the attachment before judgment takes place is decreed by the Court of first instance but is dismissed on appeal, the attachment was none the less a lawful seizure and not a wrongful one, the order of attachment might have been passed on insufficient grounds but it was not intrinsically wrongful that is there was no wrongful attachment on the day on which the attachment was made. In such a case, Article 36 or 49 applied. Even if owing to the subsequent dismissal of the suit on appeal the attachment is held to be wrongful still it may be treated as a continuing wrong under section 23 and the suit for compensation would be within time—*Manga v Changa Mal* 22 A L J 977, 81 Ind Cas 1038, A I. R. 1925 All 131. But if the attachment before judgment is unlawful (e.g. if the suit in which the attachment was made was brought by a person having a fictitious title or by a person having no title, or if the property attached did not belong to the defendant) a suit for compensation for such wrongful attachment falls under this Article. It would not fall under Article 36, 49, 62 or 120, because Article 29 is more specific than those articles—*Ram Narain v Umrao Singh*, 29 All 615, *Narasimha v. Gangaraju* 31 Mad 431. In *Manavikraman v Avitilan*, 19 Mad 80 such a suit was held to be governed by article 36 or 49 and not by Article 29, but no reason has been stated for the non applicability of this Article, except that the wrongful attachment does not amount to 'wrongful seizure'.

307. Dstraint of crops.—The decisions are hopelessly irreconcilable on the question as to which Article would apply to a suit for damages for illegal dstraint of standing crops. In some cases it has been held that the suit would be governed by Art. 36 standing crops not being moveable property within the meaning of this Article—*Hari Charan v Hari Kar*, 32 Cal 459, *Murlidhar v Mulu*, 11 N L R 18 *Sripati v Hari Kar*, 36 Cal 141. (The definition of moveable property in sec. 2 (13) of the C P Code which includes standing crops will not prevail in the Limitation Act—*Devarasetti v Devarasetti*, 18 M L T 532, *Panda v Jennuddi*, 4 Cal. 665). But in *Jagajiban v Sarai*, 7 C W N 728 it was held that Art. 28 or 29 applied to such a suit. In *Jadu Nath v Hari Kar*, 17 C. W N 308, Article 48 or 49 was held to be applicable, and not Article 29 or 36. The Nagpur Court is of opinion that Article 39 would apply.

See notes under Arts 36 30 and 49 where the subject has been fully discussed

30 —Against a carrier for One year When the loss or injury compensation for losing occurs or injuring goods

N B—The period of limitation under Articles 30 and 31 of the Act of 1877 was originally two years but by sec 3 of the Limitation Amendment Act V of 1899 it has been reduced to one year]

308 Carrier —A carrier in its general sense means a person or a company who undertakes to transport the goods of another person from one place to another for a hire It is not necessary for the purposes of Articles 30 and 31 that the carrier should also be a common carrier within the meaning of the Carriers Act 1865—*Mylappa v B I S N Co Ltd* 34 M L J 553 A landing agent is a carrier within the meaning of these Articles—*Ibid*

Sea going merchantships are carriers within the meaning of these Articles though they are not common carriers as defined in the Carriers Act (III of 1865)—*B I S N Co v Hajee Mahomed* 3 Mad 107 (110)

309 Suit based on contract —It has been held in some earlier cases that where there is a contract to deliver a suit for compensation for breach of the contract is governed by Art 115 This Article applies to suits for compensation for loss or damage to goods arising from malfeasance misfeasance or nonfeasance independent of contract—*British India Steam Navigation Company v Hajee Mahomed* 3 Mad 107 *Kalu Ram v Madras Ry Co* 3 Mad 240 *Danmull v B I S N Co* 12 Cal 477 *Mohan Singh v Henry Conder* 7 Bom 478 But these decisions were given at a time when the word non-delivery did not exist in Article 31 and the Courts had therefore to apply Art 115 to suits for compensation for non delivery of goods treating them as suits for breach of contract to deliver Article 30 was confined to action in tort and Art 31 to actions *ex contractu* In *G I P Ry Co v Russell* 19 Bom 165 Farran J however remarked (at p 188) that the Courts would have better fulfilled the intention of the Legislature by treating all claims against a carrier which would fairly be deemed to arise out of the loss or injury to goods as coming within the purview of articles 30 and 31 than by confining the general words of the former Article to a claim for compensation for loss of goods arising otherwise than out of contract

Since then the Legislature has added the word non-delivery in Article 31 (by the Amendment Act X of 1899) so that this Article is now made more comprehensive and self contained and there would be no necessity for bringing in Article 115 into a case of non-delivery It is now settled law that under Articles 30 and 31 it is immaterial whether

under any obligation to enquire at the time of attachment whether the purchase money due to the vendor has or has not been paid. The seizure is perfectly lawful—*Ram Narain v. Brij Banke*, 39 All 322 (328).

The attachment of the debtor's property by the creditor before judgment is a lawful seizure, if a decree is afterwards passed in favour of the creditor. The seizure is not wrongful by reason of the fact that it has been effected before the decree. Since the suit is subsequently decreed, the attachment to all intents and purposes, must be deemed to have been effected in execution of the decree—*Ram Narain v. Brij Banke*, 39 All 322 (at p. 328), *Manga v. Changa Mal*, 22 A. L. J. 977, A. I. R. 1925 All. 131. If the suit in which the attachment before judgment takes place is decreed by the Court of first instance but is dismissed on appeal, the attachment was none the less a lawful seizure and not a wrongful one; the order of attachment might have been passed on insufficient grounds, but it was not intrinsically wrongful, that is, there was no wrongful attachment on the day on which the attachment was made. In such a case, Article 36 or 49 applied. Even if owing to the subsequent dismissal of the suit on appeal the attachment is held to be wrongful, still it may be treated as a continuing wrong under section 23, and the suit for compensation would be within time—*Manga v. Changa Mal*, 22 A. L. J. 977, 81 Ind. Cas. 1038, A. I. R. 1925 All. 131. But if the attachment before judgment is unlawful (e.g. if the suit in which the attachment was made was brought by a person having a fictitious title or by a person having no title, or if the property attached did not belong to the defendant) a suit for compensation for such wrongful attachment falls under this Article. It would not fall under Article 36, 49, 62 or 120, because Article 29 is more specific than those articles—*Ram Narain v. Umrao Singh*, 29 All. 615, *Narasimha v. Gangaraju*, 31 Mad. 431. In *Manavikraman v. Avisilan*, 19 Mad. 80 such a suit was held to be governed by article 36 or 49, and not by Article 29; but no reason has been stated for the non-applicability of this Article, except that the wrongful attachment does not amount to 'wrongful seizure.'

307. Distrait of crops :—The decisions are hopelessly irreconcilable on the question as to which Article would apply to a suit for damages for illegal distrait of standing crops. In some cases it has been held that the suit would be governed by Art. 36, standing crops not being 'moveable property' within the meaning of this Article—*Hari Charan v. Hari Kar*, 32 Cal. 453, *Murlidhar v. Mulu*, 11 N. L. R. 18, *Sripati v. Hari Kar*, 36 Cal. 141. (The definition of moveable property in sec. 2 (13) of the C. P. Code which includes standing crops will not prevail in the Limitation Act—*Devarasetti v. Devarasetti*, 18 M. L. T. 532; *Panda v. Jennuddi*, 4 Cal. 665). But in *Jagatjiban v. Sarat*, 7 C. W. N. 728 it was held that Art. 28 or 29 applied to such a suit. In *Jadu Nath v. Hari Kar*, 17 C. W. N. 308, Article 48 or 49 was held to be applicable, and not Article 29 or 36. The Nagpur Court is of opinion that Article 39 would apply.

See notes under Arts 36 39 and 49 where the subject has been fully discussed

30—Against a carrier for One year When the loss or injury compensation for losing occurs or injuring goods

N B—The period of limitation under Articles 30 and 31 of the Act of 1877 was originally two years but by sec 3 of the Limitation Amendment Act X of 1899 it has been reduced to one year]

308. Carrier —A 'carrier' in its general sense means a person or a company who undertakes to transport the goods of another person from one place to another for a hire It is not necessary for the purposes of Articles 30 and 31 that the carrier should also be a 'common carrier' within the meaning of the Carriers Act, 1865—*Mylappa v B I S N Co Ltd.* 34 M L J 553 A landing agent is a carrier within the meaning of these Articles—*Ibid*

Sea going merchantships are carriers within the meaning of these Articles though they are not 'common carriers' as defined in the Carriers Act (III of 1865)—*B I S N Co v Hajee Mahomed*, 3 Mad 107 (110)

309 Suit based on contract —It has been held in some earlier cases that where there is a contract to deliver a suit for compensation for breach of the contract is governed by Art 115 This Article applies to suits for compensation for loss or damage to goods arising from malfeasance, misfeasance or nonfeasance independent of contract—*British India Steam Navigation Company v Hajee Mahomed*, 3 Mad 107 *Kalu Ram v Madras Ry Co*, 3 Mad 240, *Danmull v B I S N Co*, 12 Cal 477, *Mohan Sing v Henry Conder*, 7 Bom 478 But these decisions were given at a time when the word "non-delivery" did not exist in Article 31, and the Courts had therefore to apply Art 115 to suits for compensation for non delivery of goods, treating them as suits for breach of contract to deliver Article 30 was confined to action in tort, and Art 31 to actions *ex contractu* In *G I P Ry Co v Ransett*, 19 Bom 165, Farran J however remarked (at p 188) that "the Courts would have better fulfilled the intention of the Legislature by treating all claims against a carrier which would fairly be deemed to arise out of the loss or injury to goods as coming within the purview of articles 30 and 31, than by confining the general words of the former Article to a claim for compensation for loss of goods arising otherwise than out of contract"

Since then the Legislature has added the word "non-delivery" in Article 31 (by the Amendment Act X of 1899) so that this Article is now made more comprehensive and self contained and there would be no necessity for bringing in Article 115 into a case of non-delivery. It is now settled law that under Articles 30 and 31 it is immaterial whether

the liability of the defendant arises out of contract or of tort. Therefore Article 31 would apply to a suit against a carrier for compensation for non delivery of goods irrespective of the question whether the suit was laid in contract or in tort—*Venkatasubba Rao v Asiatic Steam Navigation Co* 39 Mad 1 (F B) at p 12 *Secretary of State v Dunlop Rubber Co* 6 Lah 301 26 P L R 490 *B V Ry Co v Hamir* 6 P L T 565 A I R 1925 Pat 727 *Moti Ram v F I Ry Co* 108 P R 1906 (F B) *Chiranjitlal v B N Ry Co* 52 Cal 37 29 C W N 277. In an earlier case however the Calcutta High Court (*Radha Shyam v Secretary of State* 44 Cal 16 at p 26) has expressed the opinion that a suit by the consignor against a railway company for compensation for non delivery of goods would be governed by Article 113 as it is a case of breach of a written contract the invoice being the contract (see Note 311 under Art 31). The learned Judge in this case followed the old and obsolete rulings of 7 Bom 478 and 12 Cal 477.

310 Loss.—A suit against a railway company for compensation for loss of goods alleging the same to have been due to the wilful negligence or theft by the company's servants is governed by this Article—*F I Ry Co v Ram Aular* 20 C W N 696.

Article 30 is inapplicable to a case where the goods are not lost but are lying in the lost property office of the railway company because delivery of them has not been claimed by any one. The case is one of non-delivery and covered by Article 31—*Mustaddi Lal v B B & C I Ry Co* 42 All 390 (392).

This Article does not apply where the defendant does not plead or prove any loss but on the other hand pleads that no goods were given to them for consignment—*Radha Shyam v Secretary of State* 44 Cal 16 (26).

If the plaintiff sued the railway company for non delivery of goods within three years as provided by Article 113 (which was the law before the amendment of 1899) the defendant could not set up a case that the goods were lost in order to bring the case within the shorter period of limitation under Art 30. The defendant could not ask the Court to infer from the mere non delivery that the goods were lost. If he sought to avail himself of the shorter period of limitation prescribed by this Article, the burden lay on him to prove as an affirmative fact that the goods were lost—*Mohan Sing v Henry Conder* 7 Bom 478 (480). This decision is no longer of any importance, because under the present law loss and non-delivery are provided by an equal period of limitation under Articles 30 and 31.

So also the burden of proving the time when the goods were lost lies on the defendant—*Madras & South Marhalla Railway Co v Bhimappa* 33 M L J 511.

The words against a carrier for losing or injuring goods obviously suggest not a loss of the goods to the owner but an actual losing of the

goods by the carrier himself and the words when the loss or injury occurs in the third column mean that the period of limitation begins to run from the time when the carrier lost or injured the goods, and not from the time when the consignee may be said to have suffered loss. Therefore the burden of proving when the goods were lost is decidedly on the carrier company. Where the railway company did not prove or admit that the goods were lost but on the other hand they had been continually assuring the plaintiff that the matter was under inquiry and was receiving their special attention up to a period within a year of the suit the claim of the plaintiff was not barred by Article 30 although the suit was brought more than a year after the despatch of the goods—*Jugal Kishore v G I P Ry* 45 All 43 (45) 20 A L J 792 68 Ind Cas 981 A I R 1923 All 22

The term loss does not include *misdelivery*. The word 'loss' in this Article contemplates an actual losing of the goods by the carrier himself, and therefore when the carrier delivers the goods to a wrong person, it cannot be said that he has lost the goods. Neither does Article 31 apply because misdelivery is not the same as non delivery. The case of misdelivery therefore falls under Article 115—*Fakir v Secretary of State*, 1913 P L R 170 following *Changa Mal v B & A W Ry Co*, 6 P R 1897. In a recent Full Bench case of the Lahore High Court, however, it has been held that the word loss in section 80 and other sections of the Railways Act should not be interpreted in the restricted sense of losing of the goods by the carrier, but should include loss to the owner as well, and therefore it clearly contemplates a case of *misdelivery*—*Hill Sawyers & Co v Secretary of State*, 2 Lah 133 (F B) overruling 6 P R 1897. But as it is a case under the Railways Act, it is doubtful whether it should be applied in construing Article 30 of the Limitation Act, since the two Acts are not *in pari materia*. (See 2 Pat 442, at pp 446, 448)

310A Starting point of limitation —Where on the date on which the consignee went to the railway station to take delivery of the packages, they were missing and there was nothing to show that the goods were lost prior to that date, time ran only from that date—*G I P Ry v Radhey Mal*, 47 All 549 23 A L J 398 A I R 1925 All 656

31—Against a carrier for compensation for non-delivery of, or delay in delivering, goods	One year	When the goods ought to be delivered.
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311 Scope of section —This Article applies not only to a suit brought by the consignee but also to a suit brought by the consignor. It provides for a suit for compensation for non-delivery, i.e. a suit by a person who

by reason of non delivery has sustained loss There may be cases in which it is not the consignee who sustains loss but the consignor In such cases it would be a suit by the consignor for compensation for non-delivery Thus, where the consignor (who had purchased a quantity of salt from the Salt Superintendent at Sambhar) despatched at Ramnagar station certain empty gunny bags through the railway company to be delivered to the Salt Superintendent at Sambhar who was to send back the bags filled with the salt to the consignor but the bags were not delivered, it was held that in this case it was the consignor who would suffer loss by reason of non delivery as he would not get the salt and he would be the person to sue under Article 31 The consignee had nothing to do with the bags and would suffer nothing for non delivery—*Mutsaddi Lal v B B & C I Ry Co*, 42 All 390 (393), *Chiranjilal v B N Ry Co*, 52 Cal 372 29 C W N 277, A I R 1925 Cal 559 In *Radha Shyam v Secretary of State*, 44 Cal 16 (26), 20 C W N 790 Chatterjee J has laid down the narrow proposition that Article 31 seems to contemplate a suit by the party who is entitled to the delivery, namely the consignee and does not apply to a suit by the consignor

312 Non-delivery —A suit against a carrier for compensation in respect of goods not delivered is governed by this Article and not by Art. 115—*I G N Ry Co Ltd v Nanda* 13 C W N 851, *Mutsaddi Lal v B B & C I Ry Co*, 42 All 390 *Ali Mahmad v G I P Ry Co*, 11 N L R 174, *Mohi Ram v E I Ry Co*, (1906) P R 108, *G I P Ry Co v Ganpat Rai*, 33 All 544, *Haji Ajam v Bombay & Persia S N Co*, 26 Bom 562 (570), *Venkata Subba v A S N Co*, 39 Mad 1, *E I Ry Co v Sagar Mull*, 4 Pat 482, 6 P L T 559 A I R 1925 Pat 611

The word non delivery was introduced into the Act of 1877 by the Amendment Act of 1899 Previous to 1899, a suit for compensation for non-delivery of goods was treated as a suit for compensation for breach of an implied contract to deliver and was governed by the three years' rule of limitation under Art. 115—*Mohan v Henry Conder*, 7 Bom 478, *C I P Ry Co v Raisett*, 19 Bom 165, *Hassaji v E I Ry Co*, 5 Mad 388, *Danmull v B I S N Co*, 12 Cal 477 These decisions are no longer of any authority See Note 30, in Article 30 under heading Suits based on contract It has been pointed out in that Note that it is now settled law that a suit against a carrier for compensation for non-delivery of goods is governed by Article 31, whether the suit is laid in contract on ground of non-delivery, or in tort, therefore this Article applies to a suit for compensation for non-delivery, where the suit is grounded on tort, viz where in addition to non delivery the plaintiff alleges that the railway company has wrongfully converted the goods The suit would not be governed by Art. 48, because Article 31 is more specific than Art. 48—*Secretary of State v Dunlop Rubber Co*, 6 Lah 301, 26 P L R 490, A I R 1925 Lah 478, 88 Ind Cas 974

Where goods sent through a Railway Company were not taken delivery of by the consignee and were not sent back to the consignor owing to defect in his address and were therefore sold by the Company as unclaimed goods under sec 56 of the Railways Act a suit by the consignor to recover the sale proceeds is not a suit for compensation for non delivery under this Article but is governed by Art 62—*Tara Chand v M & S M Ry Co*, 44 Mad 823

Short delivery amounts to non delivery of the things short delivered, and therefore falls under Article 31 See *Haji Ajam v Bombay & Persia S N Co*, 26 Bom 562 and *Venkatasubba Rao v A S N Co* 39 Mad 1 The Patna High Court holds that short delivery means loss of the portion of the consignment undelivered and falls under Article 30—*Rameswar Dass v E I Ry Co*, 4 P L T 331 A I R 1923 Pat 298

As to the starting point of limitation under Article 31, the burden lies on the carrier-defendant to shew when the goods ought to have been delivered—*Radha Shyam v Secretary of State*, 44 Cal 16 (26) This Article, which lays down the starting point to be the time when the goods ought to have been delivered, cannot apply to a case where it is impossible to show or prove as to when the goods ought to have been delivered—Ibid

Where on the date on which the consignee went to the railway station to take delivery of the goods the station master refused to give delivery, the period of limitation for a suit under this Article ran from that date as being the date on which the railway company ought to have delivered but failed to deliver the goods—*G I P Ry v Radkey Mal* 47 All 549, 23 A L J 398 A I R 1925 All 656 Time runs from the date on which the goods ought to be delivered and the question as to when the recovery of the plaintiff's goods became hopeless is immaterial—*Secretary of State v Dunlop Rubber Co* (supra)

Where the plaintiff made over certain goods to the Railway Company in August 1918, but the goods not having arrived at their destination, the plaintiff began to make inquiries, and from February 1919 to February 1920, there was continuous correspondence between the parties in which the plaintiff was being assured that the matter was being inquired into, and ultimately he instituted a suit in March 1920, held that since the plaintiff had all along been assured that inquiry was being made and he had even hopes of getting delivery of the goods with one year of the suit, it cannot be said that his claim was filed more than a year after the date when the goods ought to have been delivered There is no inflexible rule that time must begin to run from the expiry of the ordinary period of transit—*Jugal Kishore v G I P Ry*, 45 All 43 (46) 20 A. L. J 792, 68 Ind Cas 981

Misdelivery .—See Note 310 in Article 30 under heading "Loss"

Part V.—Two years.

32 —Against one who having a right to use property for specific purposes perverts it to other purposes	Two years.	When the perversion first becomes known to the person injured thereby.
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313 Suits under this Article —This Article should not be restricted to a suit for *compensation*. This article is independent of the nature of the remedy, and applies equally to all classes of suits brought upon the cause of action referred to in this Article—*Soman Gope v. Raghubir*, 24 Cal 160 (162). Thus, from the undernoted cases it will be evident that this Article applies to suits for *injunction, ejectment, &c*

A suit by a Zemindar against certain occupancy tenants who had converted arable land into a grove or wood by planting trees thereon, for an injunction directing them to remove the trees is governed by this Article—*Gangadhar v Zahurriya*, 8 All 446; *Jaikishen v Ram Lall*, 20 All 519. But where the trees were planted upon the waste lands of his village by certain *trespassers*, a suit for removal of the trees would be governed by Article 120 and not by this Article, because the trespassers were not "persons having a right to use property for specific purposes" within the meaning of this Article—*Musharaf Ali v Istikhhan Husain*, 10 All 634. If the suit against the trespasser is one for removal of the trees and for *possession*, Art 144 applies—*Muhammad Shaji v Bindeswari*, 46 All 52, 75 Ind Cas. 266, A I R 1924 All 443.

This Article applies to a suit brought under secs 25 (a) and 155 of the Bengal Tenancy Act for the ejectment of a tenant and for removal of trees planted by him on land leased out for agricultural purposes. Art. 120 does not apply to such a case—*Soman v Raghubir*, 24 Cal. 160.

A suit against a tenant for mandatory injunction to fill up a tank excavated by the tenant on land leased out for agricultural purposes, and in the alternative for ejectment, falls under this Article, and not under Art. 120—*Sharoop v. Joggesur*, 26 Cal. 504 (1st B) practically overruling *Kedarnath v. Khettarpaul*, 6 Cal. 34 and disapproving *Gonesh v Gondour*, 9 Cal. 147. So also, a suit for ejectment as well as for compensation against a tenant who has broken the conditions of the lease by making excavation on agricultural land, is governed by this Article—*Krishna Das v. Mohendra*, 25 C. W. N 930.

Where according to the custom of the village a pond was reserved for the common use of all the owners of the village, and no individual owner was entitled to do anything so as to interfere with such common use, and it appeared that the defendants took possession of the pond and filled it up with earth and cultivated the land, a suit for an injunction restraining

the defendant from cultivating the land was governed by this Article in as much as the defendant had perverted the pond to purposes other than those for which it was intended. This Article is not restricted to the case of a defendant who was before the encroachment in actual and exclusive possession of the property for a specific purpose and subsequently perverts it to other purposes—*Ghulan Md v Abdul Salar* 89 Ind Cas 405 A I R 1925 Lah 653

So also a suit against a tenant under sec 133 Bengal Tenancy Act to eject a tenant who had allowed a portion of his holding to be encroached upon by a stranger and had exchanged another plot of land of the tenancy in contravention of the terms of the *kabuliyat* is governed by this Article and not by Article 143—*Taker v Tarafdt* O C W N 661

Where the defendant who had formerly placed a number of beams on the plaintiff's wall and constructed a thatched roof on them subsequently placed on the wall heavier and more numerous beams and built a masonry roof on them a suit by the plaintiff for removal of the beams does not fall under this Article. There is no *perversion* of use in this case, the use remains the same namely placing beams on the wall but the defendants have carried out the purpose in a different way by placing heavier and more numerous beams. Article 32 does not apply, but probably Art 140—*Mohan v Bisharabhar* 46 All 68 78 Ind Cas 193 A I R 19 4 All 450

Where the defendant who had only the right to bury his dead in a public graveyard planted trees therein and converted it into a grove, and the plaintiff the proprietor of the land sued for possession of the plot and for removal of the trees held that the plaintiff could not sue for possession because the public (including the defendant) had got a prescriptive right to use the land as a graveyard but that he could sue to remove the trees and this suit was governed by Article 32. It was contended that Art 32 could not apply until and unless some particular person was in possession of the property and that property had been given to him for a specific purpose. It was held that this contention was not right—*Ismail v Thakur Lal* A I R 1926 Oudh 341 93 Ind Cas 89

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|--|-----------|---------------------------------------|
| 33—Under the Legal Representatives Suits Act, XII of 1855, against an executor | Two years | When the wrong complained of is done |
| 34—Under the same Act against an administrator | Two years | When the wrong complained of is done. |

35 —Under the same Act	Two	When the wrong com-
against any other	years	plained of is done.
representative.		

314 The Legal Representatives Suits Act permits the executors, administrators of the deceased, etc., to be sued for any wrong committed by him in his lifetime for which he would have been subject to an action, provided such wrong is committed within a year before his death.

Articles 33—35 provide for suits *against* executors, etc., whereas Article 20 provides for suits *by* executors, etc.

[Arts 33-35 of the present Act correspond to Art. 33 of Act XV of 1877. Arts. 34 and 35 of the old Act have been omitted for reasons stated in the notes below and to preserve the numbering of the old Act, Art. 33 has been split up into three Articles.]

Arts 34 and 35 of Act XV of 1877 ran thus —

34 —For the recovery of a wife	Two years	When possession is demanded and re- fused
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35 —For the restitution of conjugal rights	Two years	When restitution is demanded and is re- fused by the husband or wife, being of full age, and sound mind
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315 Under the Act of 1877 there was a conflict of opinion as to the applicability of these Articles and as to the application of sec 23 to the suits contemplated by these Articles

Thus where a suit for recovery of wife was brought by the husband against a person who detained the wife it was held in one case that the cause of action arose when the husband demanded possession of his wife and was refused and section 23 did not apply. The suit was barred unless brought within 2 years after demand—*Ghani v. Mehram*, 60 P. R. 1879. In another case it was held, however, that a third person who harbours a run away wife does a continuing wrong and in a suit by the husband against such person for the recovery of his wife a fresh period of limitation runs at every moment of the time during which the wrong continues under sec 23—*Khairuddin v. Buddi*, 80 P. R. 1892.

So also, in respect of suits under Article 35 it was held in some cases that the refusal of a wife to return to her husband and to allow him the exercise of conjugal rights was a continuing wrong giving rise to constantly recurring causes of action, so that the suit though governed by Article 35 was not excluded from the operation of section 23. The suit was there-

fore practically exempt from limitation—*Bai Sari v Sankha* 16 Bom 714 *Hem Chaud v Shiv* 16 Bom 715 (Note) *Ghans v Mehran* 1879 P R 60 In an Allahabad case it was held that since the personal law of Hindus and Mahomedans did not require an antecedent demand in a suit for restitution of conjugal rights Article 35 was inapplicable to such a suit but Article 120 would apply as read with section 23 and the suit was practically never barred—*Binda v Kaunssia* 13 All 126 In several other cases it was laid down that if a demand and refusal were in fact made, the suit would be governed by Article 35 and would be barred if brought more than two years after demand notwithstanding the provisions of section 23—*Dhanjibhov v Hirabai* 25 Bom 644 (F B) *Saravanas v Poovayi*, 28 Mad 436 *Asirunnessa v Buzloo Meah* 34 Cal 79 In *Fakirganda v Gargi* 23 Bom 307 the Judges were in doubt as to whether section 23 would apply

To avoid this conflict of decisions the Legislature has omitted those Articles from the present Act so that the suits contemplated by those Articles are now altogether exempt from the bar of limitation

But when a right to restitution has already been barred under the Act of 1877 it cannot be revived by reason of the fact that it is saved from the bar of limitation by the present Act—*Muhammad v Sakina* 37 Bom 393 The Allahabad High Court holds on the contrary that in the absence of a provision in the present Act to the effect that nothing herein contained shall be deemed to revive any right to sue barred under the old Act the plaintiff's remedy though barred under the old Act subsists under the new Act of 1908—*Ayesa v Faiyaz* 34 All 412 This view it is submitted is incorrect The provision Nothing herein Act has not been reproduced in the present Act for the obvious reason that a similar provision exists in sec 6 of the General Clauses Act of 1897 See notes at p 4 ante]

36—For compensation for	Two	When the malfeasance,
any malfeasance mis	years	misfeasance or non-
feasance or nonfea-		feasance takes place
sance independent of		
contract and not herein		
specially provided for		

316 Malfeasance, misfeasance and nonfeasance—These words are equivalent to and have the same significance as the word 'tort' They have the widest import and embrace all possible acts or omissions commonly known as torts by English lawyers—*Esso v Steam Ship Savitri*, 11 Bom 133 (135) These terms are generally applied to some wrongful act committed by persons standing in a fiduciary or quasi fiduciary

character, such as executors, trustees and directors of companies—*per Maclean C J in Mangru v Dolhin*, 25 Cal 692 (699)

317. Suits not under this Article —Art 36 is a general Article governing suits for compensation for torts to which no special Article applies. Thus a suit for compensation for wrongful attachment of moveable property before judgment is a suit for compensation for "wrongful seizure under legal process" under the specific Article 29 rather than a suit under Article 36—*Ravi Narain v Umrao Singh*, 29 All 615 (617). The judgment-creditors' act of attaching the property of their judgment debtor and asking the Court to distribute the sale proceeds among them, or their act of withdrawal of this money under the orders of the Court, cannot be regarded as misfeasance or malfeasance within the meaning of the section—*Ram Narain v Brij Banke*, 39 All 322 (330).

Where the malfeasance etc amounts to a trespass upon land, this article would not apply, but Article 39 which is more specific—*Narasimmacharya v Raghupathia*, 6 Mad 1,6

Plaintiff mortgaged his house to defendants who sold the same by a power contained in the deed and possession was given to the purchaser. Some timber (which was not mortgaged) was stored in the house, and was not returned or accounted for to the plaintiff, for which he brought the present suit, alleging that the defendants had converted it to their use. *Held* that the plaintiff could recover the timber or its value, and the suit for such recovery was governed by the more specific Article 49 than by this Article, as the suit is for recovery of the specific moveable property or for compensation for wrongfully taking the same—*Passanha v Madras Deposit and Benefit Society*, 21 Mad 333

A suit for compensation for the wrongful seizure of a ship under an order of Court is governed by the more specific Article 29, rather than by this Article—*Madras Steam Navigation Co Ltd v Shahmar Works Ltd*, 42 Cal 85 (108)

Where the compensation money awarded by Government for land acquired by them had been withdrawn by a tenant representing himself to be the owner, and a suit was subsequently brought by the landlord against the tenant for the recovery of his share of the compensation money, *held* that the suit came more properly under Article 62 or 120 than under this Article—*Khetter Kristo v Druendra*, 3 C W N 202

This Article applies to *fortious* acts independent of contract. Therefore, a suit by an auction purchaser against the decree holder for compensation on account of a misdescription of the boundaries of the land in the proclamation of sale is not governed by this Article, in as much as the liability of the decree holder, if any, is based on the contract of sale—*Mahomed v Nairoji*, 10 Bom 214 (218). But *quære* whether a Court sale can be called a *contract*.

Where the defendant agreed to sell to the plaintiff certain goods of

another person on the representation that he (defendant) had authority to sell those goods when in fact he had none and afterwards failed to sell those goods a suit by the plaintiff for compensation is not one ~~on~~ in tort but one connected with a contract and arising out of the ~~breach~~ of a contract. The suit is governed by Article 113, and not by the ~~Act~~—*Vairavan v Aricha* 38 Mad 275 (277)

Where some of the joint tenants of certain lands took the ~~possession~~ occupation of part of the joint lands to the exclusion of the other ~~tenants~~ tenants, a suit by the latter for compensation for such use and ~~occupation~~ occupation by the former was governed by Article 120. Article 36 ~~could not~~ apply, for when the defendants being tenants in common with the ~~plaintiffs~~ plaintiffs, exclusively occupied a portion of ~~joint~~ lands they could not be ~~regarded~~ regarded as doing any act of misfeasance malfeasance or nonfeasance ~~within the~~ meaning of this Article—*Robert Watson & Co v Ram Chand* 2, Cal 1804 (804)

An application under sec 214 of the old Indian Companies ~~Act~~ (sec 235 of the Companies Act of 1913) by an official liquidator ~~proving~~ proving that the directors of the company in liquidation be ~~ordered~~ ordered to pay over to him a sum of money which had been improperly distributed ~~amongst~~ amongst the shareholders, is not a suit and therefore this or any other ~~provision~~ provision of the first division of this Schedule cannot apply to it—*Raja v Ramesh* 19 Mad 149. In another case it has been held that a ~~proceeding~~ proceeding under sec 214 of the Companies Act (1882) is not subject to the ~~provisions~~ provisions provided by Article 36 as such proceeding is not a suit—*Central Bank v Bank*, 18 All 12 (15). But sec 235 (3) of the Indian Companies ~~Act~~ Act expressly lays down that an application under sec 235 of ~~the Act~~ the same position as a suit for the purposes of the ~~Limitation Act~~ Limitation Act is as to which Article of the Limitation Act is ~~applicable~~ applicable. The Court holds that this application is governed by Article ~~36~~ 36—*Ld v Hukim Chand* 71 Ind Cas 297, A I R 1923 ~~1~~ 1. *v Bharat National Bank* 5 Lah 27 (30). But the ~~majority~~ majority is of opinion that Article 36 cannot apply because the ~~matter~~ matter is not a matter independent of contract the directors ~~are not~~ are not street or trespassers but they are bound by the ~~company~~ company. Moreover if Article 36 were to apply a fraudulent ~~director~~ director could keep the shareholders and others in ignorance of ~~the loss~~ the loss for two years and he would then be immune. Article ~~36~~ 36—*In re Union Bank* 47 All 699 23 A L J 473. 8 1925 All 579.

318 Suits under this Article.—A suit by ~~the owner~~ the owner for damages for the loss of his ship caused by ~~the collision~~ the collision of a steamer is an action on tort founded upon the ~~negligence~~ negligence of the captain or his servants in the management of his ~~ship~~ ship.

within two years under this Article—*Essoo v Steam Ship "Savitra", 11 Bom 133 (1138)*

During the tenure of office of the Chairman of a Municipal Council the manager embezzled sums of money. The Council sued the Chairman more than two years thereafter to recover the amount lost by reason of the embezzlement on the ground that he as Chairman was the agent appointed by the Municipality and in that capacity was bound to collect the dues and see that proper accounts were kept and that he was liable to pay the loss which had occurred by the said embezzlement. It was held that the relation of principal and agent did not exist and that therefore Arts. 89 and 90 of the Limitation Act did not apply. That the case was governed by this Article and that the suit was therefore barred by limitation—*Srinivasa v Municipal Council of Karur, 22 Mad 342*

A suit brought by the son of a deceased *shebait* of a *debutter* estate for the recovery of money advanced by the deceased on account of the debutter estate at a time when he had been wrongfully kept out of office by the defendant who had claimed the office as against the deceased and realised money out of the estate was held to be governed by this Article if the suit was brought against the defendant *personally* but if it was against the defendant as representing the debutter estate it would be governed by Art. 110—*Peary Mohan v Narendra 5 C W N 273*

A suit for wrongful attachment of moveable property before judgment has been held in a *Muiras* case to be governed by Article 36 not by Art. 29—*Manatikraman v Avisilan 19 Mad 80*. See this case cited in Note 306 under Art. 29.

Where the Collector of customs detained the plaintiff's goods on representation made by the defendant company maliciously and without reasonable and probable cause a suit for damages for such detention against defendant is governed by Article 36. Article 49 cannot apply because the defendant company never had possession of or control over the goods and the Collector cannot be looked upon as the defendant company's agent—*Albert Bounan v Imperial Tobacco Co, 30 C W N 465 A I R 1926 Cal 757*

A suit by a temple servant who has been suspended from service for compensation for the loss of perquisites during the period of suspension is governed by this Article—*Bharadwaj v Arunachala 41 Mad 538* (see this case fully cited under Article 102)

319 Attachment and removal of crops — Article 36 would apply to a suit for damages for wrongful attachment, cutting and carrying away of plaintiff's crops—*Jadunath v Hari Kar 36 Cal 141 Mohesh Chandra v Hari Kar, 9 C W N 376*

In *Hartikaran v Hari Kar 32 Cal 459* also it was held that the suit fell under Article 36, and not under Article 49, because 'standing crops' are not moveable property. But in *Jagatjiban v Saraf, 7 C. W. N. 728,*

their Lordships were of opinion that Art 28 or 29 would apply to such a suit

320 Wrongful removal of crops without attachment —There have been contradictory decisions as to which Article of this Act applies to a suit for cutting and carrying away crops *without any process* of attachment. Thus in *Sakunomoyi v Pallari* 4 Cal 625 the learned Judges held that a suit of this kind is a suit for profits of immoveable property belonging to the plaintiff wrongfully received by the defendant within the meaning of Article 109 and not a suit for compensation for malfeasance under Article 36

In *Panda Gazi v Jennuddi*, 4 Cal 161, Article 36 has been held to be applicable

In the case of *Surat Lal v Umar* 22 Cal 877, *Norris J* expressed his opinion that the suit fell under the specific Article 48 and not under Art 36 and that crops when standing on the land are immoveable property, but when severed from the land they are moveable property. *Ghose, J*, held that if the suit was regarded as one for compensation for the wrongful act on the part of the defendants in cutting the crops on the plaintiff's ground Art 39 would apply but if it was regarded simply as a suit for damages for carrying away and misappropriating the crops, the case would fall under Art 49. Owing to this difference of opinion the case was referred to a third Judge (*Rampini J*) but he dissented from both the Judges and held that Art 36 applied to the case and not Art 39, 49 or 109

In the Calcutta Full Bench case of *Mangin v Dolhin* 25 Cal 692, *Rampini, J*, held that the suit not being one for compensation for trespass, Art 39 did not apply, that Art 48 or 49 also did not apply as they deal with property which is *ab initio* moveable and cannot be held applicable unless the first wrongful act viz, the conversion of the immoveable into moveable property, be disregarded, that Art 109 also did not apply as it referred to a case in which possession of immoveable property was withheld, and that therefore Art 36 applied. *Maclean, C J*, and *Trevelyan, J*, held, that assuming that the case did not come within Art 39 the case was governed by Art 49, for the crops though immoveable in the first place became specific moveable property when severed, and the fact that the severance was a wrongful act did not make any difference. *Macpherson, J*, held that Art 48 or 49 applied as the crops after they had been cut came under the description of specific moveable property and that possibly also the case might be brought under Art 109 if it was not brought under Art 39. *Ghose, J*, held that Art 49 applied. Thus the majority of the Full Bench were in favour of the application of Art 49 and were against the application of Article 36. The above case of *Surat Lal v Umar*, 22 Cal 877 must be treated as overruled by this Full Bench case

321. Cutting away trees —Where land with trees planted thereon was hypothecated, and afterwards the mortgagors sold the trees to

defendants who cut and carried away the trees a suit instituted by the mortgagees against the defendants for compensation for cutting and carrying away the trees and thereby impairing the value of the security is governed by Art 36 or 49—*Munappa v Seshayya* 3 L W 341

A suit by the mortgagor against the mortgagee (usufructuary) for damages in respect of certain trees wrongfully cut by the mortgagee during the time he was in possession of the mortgaged property is governed by this Article—*Sivachidambara v Kamatchi* 33 Mad 71

The Calcutta High Court holds that a suit by a landlord for compensation for the removal of trees cut down by a tenant is not governed by Art 36 but by Art 48 or 49—*Mahomed Hamidar v Ali Fakir* 10 C L J 23

For a case in which a suit for entering on the plaintiff's land and cutting away trees was held to be a suit for compensation for trespass upon immoveable property see 20 N L R 80 cited under Art 39

322 Starting point of limitation —The time from which limitation begins to run is the date of the alleged misfeasance or malfeasance and not the date when the plaintiff came to know of the misfeasance. The knowledge of the plaintiff has nothing to do with the question—*Sivachidambara v Kamatchi* 33 Mad 71 (74)

In a suit for compensation governed by Art 36 section 23 would be applicable if there is a continuance of the injury caused by the defendant. Limitation will run when the injury ceases—*Surajmal v Maneksha* 6 Bom L R 704. In this case the misfeasance complained of was the issue of a prohibitory order which was allowed to continue in force for five years. See also *Maiga v Changa Mal* 22 A L J 97. A I R 1925 All 131

Part VI—Three years

37 —For compensation Three The date of the obstruction
for obstructing a way years tion
or a watercourse

323 An obstruction to a watercourse being a continuous act of wrong as to which the cause of action is renewed *de die in diem* section 23 applies and a suit brought after three years from the date of the obstruction would not be barred—*Rajrup v Abdul* 6 Cal 394 (P C). Where the obstruction caused by closing the main sluice of a tank continued and the plaintiff was prevented from removing the same by threat of violence it was a continuing wrong under this Article read with sec 23 and the suit was in time if brought within three years of the last day to which the wrong continued—*Sona Patil v Laxman* 82 Ind Cas 482 A I R 1925 Nag 189

38 —For compensation for Three The date of the diversion
diverting a water- years
course,

39.—For compensation Three The date of the trespass.
for trespass upon im- years
moveable property

324 'Trespass' includes the mischief which the trespasser commits after entering on the land Therefore a suit for damages for unlawfully setting fire to and destroying pepper vines on the plaintiff's land is governed by this Article—*Moudeen v Koman Nair*, 23 M L J 618 17 Ind Cas 605

Where the defendants trespassed upon the land of the plaintiff and in the course of the trespass he cut plaintiff's valuable lac producing trees on the land, and removed the same, and thus caused damage to him, and the plaintiff brought a suit for damages sustained for wrongfully cutting the lac-producing trees and for removing the trees, held that the suit was one for compensation for trespass upon immoveable property within the meaning of this Article and not a suit under Article 36 The suit is one for damages sustained on account of the lac crops of which the plaintiff was deprived by reason of the defendant's illegal act of trespass in cutting down the trees and in removing them If the trees had not been cut but only the lac crop had been enjoyed by the defendant, plaintiff's claim would have been governed by Article 109 If the claim had been purely for compensation for removal of trees cut, the case would have fallen under Article 48 or 49 What the plaintiff complains of is not merely the removal of the trees, but also the cutting itself as having involved the infringement of his right, and he claims compensation with reference to such infringement, as this infringement has been made by a trespasser, Article 39 applies to the suit as a whole—*Narbada Prasad v Akbar Khan* 20 N L R 80, 80 Ind Cas 769, A I R 1924 Nag 125

Where the defendant enters on the plaintiff's land and receives the profits, a suit by the plaintiff for such mesne profits received by the defendant is governed by Article 109 but if the defendant does not actually receive any profits and the land remains waste, a suit by the plaintiff for mesne profits (i.e. the profits which he might have received from the land) is a suit for damages for trespass and falls under this Article (not under Article 109)—*Ramasami v Authi Lakshmi Ammal*, 34 Mad 502 (dissenting from *Abbas v Fassuhuddin*, 24 Cal 413)

A trespass is a continuing wrong, continuing from its inception until the possession of the trespasser comes to an end therefore a suit may be brought within 3 years from the date on which the defendant's possession ceased, and compensation may be claimed for damages suffered within three years preceding the suit—*Narasimmacharya v Raghupathicharya*, 6 Mad 176

The cause of action in a suit to have a drain closed on the ground that it passed through plaintiff's land, was held to count from the last act

trespass each act of trespass causing a fresh right of action—*Ramphul v. Misree* 24 W R 87

Removal of crops —See *Surat Lal v Umar* 22 Cal 877 *Mangun v Dolhin* 25 Cal 692 (F B) and *Jadunath v Hari Kar* 36 Cal 141 cited in Notes 319 and 30 under Art 36

The Nagpur J C Court and the Madras High Court are of opinion that standing crops being immoveable property for the purpose of the Limitation Act a suit for illegal attachment of standing crops is a suit for trespass upon immoveable property and is governed by Article 39 which specifically provides for suits for compensation for such trespass and not by the general Article 36 which provides for suits for compensation for torts not provided for elsewhere—*Nagabo v Madholala* 4 N L R 49 *Suraj Mal v Prohbad* 18 N L R 96 A I R 1922 Nag 712 *Venkataramanujam v Basavayya* 25 M L J 447 71 Ind Cas 213

40 —For compensation	Three	The date of the infringement
for infringing copy-	years	
right or any other		
exclusive privilege		

325 This Article applies to a suit for an account of profits obtained by the infringement of an exclusive privilege—*Kinnmo id v Jackson* 3 Cal 17

The right to a trade name or trade mark is an exclusive privilege and a suit for damages for infringing the privilege is governed by this Article—*Vercados v Macleod* 45 P R 1919

41 —To restrain waste	Three	When the waste begins
	years	

326 A suit by the reversioner not only to restrain the waste of moveable property by the widow but also praying that the property be handed over to a receiver appointed for such purpose and that the donees from the widow be directed to replace any part of the property which can be traced in their hands falls under Article 120—*Venkanna v Narasimhan* 44 Mad 984

The words when the waste begins in the third column indicate that an act of waste is not a continuing wrong within the meaning of section 23

42 —For compensation	Three	When the injunction ceases
for injury caused by an	years	
injunction wrongfully		
obtained		

37 In *Mohini Mohan v Surendra* 42 Cal 550 (at p 556) Fletcher J expressed doubt as to whether a suit contemplated by this section was

at all maintainable and disapproved of the ruling in *Nand Coomar v Gour Sunkar* 13 W R 305 in which such suit was held to be maintainable See sec. 95 of the C P Code 1908 which provides for an application to recover compensation for injunction

The defendant judgment creditor attached certain property of his judgment-debtor the plaintiff intervened and claimed the property as his own The defendant applied for and obtained an injunction directing that the property should not be made over to the plaintiff The claim-proceedings terminated in plaintiff's favour and thereupon the plaintiff sued for loss of a part of the property while it was under the defendant's attachment It was held that the suit was governed by this Article, and not by Art 29—*Ida v Rahmat* 24 All 146 *Haji Pir Muhammad v Thakur Das*, 40 P R 1881

Time begins to run as soon as the injunction is at an end When an injunction is granted in a suit but the suit is dismissed by the Court of appeal on the 3rd July 1905 and the order of dismissal is affirmed on appeal to the High Court on the 22nd December 1905, the injunction is said to terminate on the 3rd July 1905—*Bhulanath v Chandra*, 16 C L J 34

Where a temporary injunction was at first granted in a suit, and the Court afterwards passed a decree granting a perpetual injunction, the period of limitation in respect of a suit for damages for the temporary injunction began to run from the date when the Court passed the decree for perpetual injunction, that being the date when the temporary injunction ceased and was replaced by the perpetual injunction—*Mohini Mohan v. Surendra*, 42 Cal 350

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|---|--------------------|---|
| <p>43.—Under the Indian Succession Act, 1865, section 320 or section 321, or under the Probate and Administration Act, 1881, section 139 or section 140, to compel a refund by a person to whom an executor or administrator has paid a legacy or distributed assets.</p> | <p>Three years</p> | <p>The date of the payment or distribution.</p> |
| <p>44.—By a ward who has attained majority, to set aside a transfer of</p> | <p>Three years</p> | <p>When the ward attains majority</p> |

property by his guardian

328. Change —This Article corresponds to Art 44 of Act XV of 1877, the words "transfer of property" being substituted for the word "sale" occurring in the old Act

The term 'sale' in Art 44 of the Act of 1877 was held to be not confined to an assignment of absolute ownership only but meant an assignment of the ward's interest whatever that interest might be Article 44 was therefore applied to a suit by the ward to set aside an assignment by his guardian of his right as mortgagee—*Madugula Latchiah v Pally Mukhalinga*, 30 Mad 393 (395) It was also suggested by Whitley Stokes in his Anglo-Indian Codes Vol II, page 950 that this Article should be extended to mortgages and leases As a result of these suggestions, the word 'sale' has now been changed into 'transfer of property' in the present Act.

329. Scope of Article —The use of the term "ward" in this Article is peculiar, and there seems no reason why the word "minor" should not have been used But the term 'ward' should not be interpreted to mean only a minor to whom a guardian has been appointed or declared by the Court under the Guardians and Wards Act The Article is not restricted to transfers made by guardians appointed or declared under the above Act, but also applies to transfers made by natural guardians as well—*Fakirappa v Lumanna* 44 Bom 742 (at pp 761, 763), 22 Bom L R. 680 58 Ind Cas 257

This Article applies not only to a suit brought by the minor himself after attaining majority but also to a suit by the minor's reversioner after the minor's death; see *Fakirappa v Lumanna*, 44 Bom 742 A suit by a purchaser from the minor is also governed by this Article—*Chandra v Maruti*, 5 N L R 50 But see 11 Bom 502 cited in Note 331 below

Where a sale was effected by the minor's father not in his capacity as guardian but in his capacity as executor under a will (under which the minor was a legatee), held that this Article did not apply to a suit to recover the property sold—*Ganapathi v Sivamalai*, 36 Mad 575

If the Karnavan alienates the immovable property of a tarwad, some of whom are minors and the alienation is made by the Karnavan not only as the guardian of the minors but also in his capacity as Karnavan, this Article does not apply, and a suit for possession by the minor after attaining majority is governed by Article 144—*Kanna Pannikhar v Nanchan*, 46 M L J 340 A I R 1924 Mad 607, 78 Ind Cas 564

330. Void transfers —Where the alienation made by the guardian is an absolute nullity, it is unnecessary for the minor to get it set aside under this Article; he can sue to recover possession within the longer period allowed by Art. 144

Thus, an alienation by a *de facto* guardian, i e., a person who is not a

lawful guardian and who has no authority to act as guardian (e g a mother or step mother or brother under the Mahomedan law or a step-mother or paternal aunt under the Hindu law) is void (and not merely voidable) and need not be set aside this Article does not apply to such a case. The plaintiff can bring a suit to recover possession under Art 144—*Maladin v Ahmed Ali* 34 All 213 (P C) 9 A L J 215 *Balappa v Chanbasappa* 17 Bom L R 1134 *Anandappa v Totappa* 17 Bom L R 1137 (Foot note) *Sheskh Rajah v Sheskh Wazir* 1 P L J 188 *Satrohan v Inder Bikran* 10 O C 367 *Sadulla v Sulaiman* 6 Lah L J 516 84 Ind Cas 923 *Ghandu Lal v Anant Ram* 135 P R 189 *Sartar Shah v Haji* 28 P R 1909 *Tajjad v Mahanmad Zulfikar* 83 P R 1916 *Uttam Singh v Gurmukh Singh* 15 P R 1913 *Husen v Rajarasi* 10 N L R 133 *Vitu v Debidas* 13 N L R 55 *Panjab Rao v Ataram* A I R 1926 Nag 124 *Laloo Karihar v Jagat Chandra* 25 C W N 258 *Thyanmal v Kuppanna* 38 Mad 1125

Where a sale-deed executed by a guardian in respect of properties in one district was registered in another district by fraudulent inclusion in the deed of a small item of property situated in the latter district which neither the vendor intended to sell nor the purchaser to buy held that the sale-deed was not duly registered and the sale being therefore totally inoperative this Article did not apply but Art 144—*Narasimha Rao v Papunna* 43 Mad 436

In a joint Hindu Mitakshara family there can be no guardian of property of a minor since the interest of a member of such family is no individual property at all. Consequently an alienation made by a person calling himself such a guardian is not binding on the minor and no suit is required to be brought by him under this Article to set aside the sale. He can bring a suit for possession under Art 144—*Kalyan Sing v Pitambar* 13 A L J 94 *Asaram v Ratan Singh* 12 N L R 12 *Veerasami v Sivagurunath* 21 L W 111 A I R 1925 Mad 793 *Appanna Prossada v Appanna Mahapatra* 5 L W 374. And so where several brothers constitute a joint Hindu family the elder brother is undoubtedly the manager of the family but he is not the guardian of his minor brothers because there can be no guardianship in such a case. Even assuming that he was a *de facto* guardian still this Article cannot apply as it does not contemplate a *de facto* guardian—*Diyaiah v Vishnu* 27 Bom L R 495 87 Ind Cas 721 A I R 1925 Bom 372

331 Voidable transfers.—Where the alienation is not void but voidable only and would bind the minor until it is set aside he cannot ignore the transaction but must sue to set it aside within the period prescribed by this Article. Even though the suit is framed as a suit for possession still it will be treated as a suit to set aside the sale under this Article because he cannot establish his right to possession without first setting

aside the alienation—*Labha Mal v Malak Ram*, 6 Lah 447, 89 Ind Cas 602 A f R 1925 Lah. 619

Thus, an alienation by a natural or lawful guardian who goes beyond the scope of his authority or alienates without legal necessity is *voidable* at the option of the minor and not *void* altogether, and a suit to set aside such alienation and to obtain possession is governed by this Article and not by the twelve years rule—*Laxmava v. Rachappa*, 42 Bom 626 *Brojendra v Prasanna* 24 C W N 1016, *Madugula Latchia v Pally Mukkulinga*, 30 Mad 393, *Satyalakshmi v Jagaunatham* 34 M L J 229, *Ranga Reddi v Narayana Reddi*, 28 Mad 423 *Labha Mal v Malak Ram*, 6 Lah 447 26 P L R 531 *Tara Chand v Murlidhar*, 3 Lah L J 280, *Arunugam v Pandian*, 40 M L J 475, *Sham Chandra v Gadadhar*, 13 C L J 277 *Said Shah v Abdulla*, 19 P R 1902, *Ghulam Rasul v Ajab Gul*, 57 P R 1891 *Kolhu v Belsingh*, 17 N L R 183 *Kamakshi v Ramasami*, 7 M L J 131 *Satish Chandra v Chunder Kant*, 3 C W N 278 Where a person (a manager of a joint Hindu family) executed a *mukhtarnama* providing for the management of the family estate both during his life time and after his death until his eldest minor son attained majority, and the *mukhtear* was given the power to manage the estate as he thought fit including the power of sale held that a sale by the *mukhtear* was binding on the minor sons and could not be treated as a nullity and a suit to challenge the sale was governed by this Article—*Mahableshwar v Ramchandra*, 38 Bom 94 An alienation by a guardian appointed under the Guardians and Wards Act, without the sanction of the Court is *voidable* and not void (see section 30 of the Guardians and Wards Act) consequently, a suit by the minor to set aside the alienation after attaining majority falls under this Article

If the minor fails to bring the suit for possession within 3 years after attaining majority, his right to the property will be extinguished by operation of section 28—*Kandasami v Irusappa* 41 Mad 102 (105) *Ghanasambanda v Velu Pandaram* 23 Mad 271 (P C) at p 279 The fact that in a previous suit by the alienee against the ward to recover some properties which had not passed to his possession under the transfer the alienation was found invalid will not relieve the ward from the consequences of his failure to have the transfer set aside within the period allowed by law with regard to properties which had passed to the possession of the alienee When at the time such previous suit was brought the ward's right to such property had been extinguished under section 28, the decision will not have the effect of reviving the extinguished right—*Madugula Latchia v Pally Mukkalinga*, 30 Mad 393 (397)

Where a property had been mortgaged by the minor's father, and after his death the natural guardian (e.g. mother) of the minor sold the equity of redemption to the mortgagee without any legal necessity, a suit by the minor after attaining majority to redeem the mortgage is

governed by Article 44 because the plaintiff cannot redeem without suing to set aside the sale of the equity of redemption—*Fakirappa v Lumanna* 44 Bom 747 (overruling *Bhagvant v Konde* 14 Bom 279) But if the equity of redemption was sold by a person acting as guardian but without any authority to act as such (e g a step mother who is not a guardian under the Hindu law) the sale is void and need not be set aside and a suit by the minor after attaining majority to redeem the mortgage is not governed by this Article *Balappa v Chanbasappa* 17 Bom L R 1134

A suit under this Article must be brought within three years after the minor attains majority and the burden lies on the minor to prove that his suit is in time if the date of attaining majority is disputed—*Prokhad Chandra v Ramsaran* 38 C L J 213

Where a minor's property was sold by the minor's guardian and the minor after attaining majority transferred the same property to another and then the transferee as principal plaintiff (plff no 1) and the transferor as the second plaintiff sued to set aside the sale within three years of the minor attaining majority held that so far as plaintiff no 2 was concerned the suit was within time because he has brought the suit within three years of his attaining majority under Article 44 As regards for plaintiff no 1 the question is not free from difficulty because Article 44 cannot apply to the case of a transferee from the ward and a separate suit brought by him would have been barred No doubt this suit is substantially by the plaintiff no 1 and plaintiff no 2 is joined only to save limitation because he has no interest in the suit but still it is open to the parties to save limitation by adopting that course in view of the provisions of Article 44 Moreover the fact that plaintiff no 2 has conveyed his interest in the property to plaintiff no 1 does not mean that he has no interest in maintaining the suit to set aside the alienation The remedy contemplated by Art 44 is open to the ward for three years from the date of his attaining majority and that remedy is not lost by the mere fact that he purports to transfer his interest in the property such as it is at the date of the transfer to a third party At the date of the transfer he had a right to sue to set aside the sale until it was set aside the sale was good so far as he was concerned and his interest in the property was subject to the result of a suit In order to make his transfer to plaintiff no 1 effective and to save the right of the transferee from being barred by limitation he had to sue to set aside the sale, and to establish his title to the property by showing that the sale was not binding on him Therefore plaintiff no 2 was entitled to sue to set aside the sale in spite of the transfer in favour of plaintiff no 1 and there can be no objection to his joining in the present suit although it was brought substantially by the plaintiff no 1 As the suit by plaintiff no 2 is maintainable time barred the suit by plaintiff no 1 is also saved from limitation and a suit brought by plaintiff no 1 alone would have been barred by 1

as more than 12 years have elapsed after the date of the sale by the guardian of plaintiff no 2—*Hannant v Ramappa*, 49 Bom 309, 27 Bom L R 211, 86 Ind Cas 879, A I R 1925 Bom 292

332. Section 7 —This Article should be read subject to the provisions of section 7. Thus two brothers brought a suit to set aside a sale effected by their mother as guardian during their minority. The suit was brought within three years of the younger brother attaining majority but more than three years after the elder brother came of full age. Held that the claim being a joint claim and the suit having been brought more than 3 years after the attainment of majority of the elder brother, who as manager of the family was competent to give a valid discharge under section 7 as soon as he became a major, the claim was barred by limitation even in respect of the share of the younger brother—*Doraisami v Nondisami*, 38 Mad 118 (F B), *Mahableshwar v Ramchandra* 38 Bom. 94, *Kuppaswami v Kamalammal*, 43 Mad 842, *Babu Talya v Bala Raoji*, 45 Bom 446

45.—To contest an award under any of the following Regulations of the Bengal Code —	Three years	The date of the final award or order in the case
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The Bengal Land revenue Settlement Regulation, 1822 (VII of 1822).

The Bengal Land revenue Settlement Regulation, 1825 (IX of 1825)

The Bengal Land-revenue (Settlement and Deputy Collectors) Regulation, 1833 (IX of 1833)

333 Scope of Article —This Article would apply even though the plaintiffs were not parties to, and did not appear in, the Settlement proceedings—*Tulstrani v Mohamad*, 10 W R 48. Under this Article, any person who wishes to contest an award, whether bound by it or not, must bring his suit within three years. But Article 46 applies only to those persons who are bound by the award, and relates to suits for recovery of property.

This Article does not apply unless the award is a valid one and made in accordance with the provisions of law. Where the Assistant Collector

not being able to come to any decision as to the possession and rights of the parties in an estate refers the whole matter to the Collector and he without hearing the parties and after only reading the evidence taken by the Assistant Collector passes an order such an order has no element of a judicial character and has not the authority of an award it need not be contested within 3 years but the party may bring a suit for possession within 12 years—*Bhaoni v Maharaj Sing* 3 All 738

Regulation VII of 1822 does not empower the Collector to decide disputes as to title between raiyats but only to decide disputes in regard to the nature of any tenancy A decision by the Collector as to the title between two raiyats is not an award under the Regulation or within the meaning of this Article—*Rajani Kant v Ram Dulal* 17 C W N 55

A suit not to set aside an award but to obtain possession of land from which the plaintiff has been dispossessed by virtue of an order under sec. 145 Criminal Procedure Code which was to the effect that the defendants were in occupation of the disputed land on the strength of a settlement made in their favour does not fall under this Article—*Midnapore Zemindary Co v Naresk Narayan* 49 Cal 37 33 C L J 497

334 Limitation —In a suit to contest an award of a Survey Deputy Collector the period of limitation begins to run where there has been an unsuccessful appeal to the Commissioner and then to the Board of Revenue from the date of the order of the latter—*Kishen Chunder v Mahomed Afzal* 10 W R 51 Where A and B were similarly affected by a survey award and A appealed but B did not the period of limitation in respect of B's suit to set aside the award would run from the date of the award and not from the date of the order on A's appeal in which B did not join—*Tulsiyam v Mohamed* 10 W R 48

A settlement award under Regulation VII of 1822 in favour of a mortgagee in possession becomes binding upon the mortgagor if he allows it to remain unchallenged for three years and the mortgagor is thereafter debarred from bringing a suit for redemption—*Sreechund v. Mullick* 9 W R 564

46—By a party bound	Three	The date of the final
by such award to re	years	award or order in the
cover any property		case
comprised therein		

335 Scope of Article —The award referred to in this Article is an award under the Regulations mentioned in Art 45 An award passed in a civil suit is not one coming under this Article—*Lachman v Alma* 25 P R 1883

This article applies only to parties bound by the award A person who was not a party to an award or order is not bound by it and is

therefore debarred from bringing a suit for possession under the twelve years rule of limitation—*Pureeag v Shisb* 3 W R 165 *Kanto v Asad* 5 C L R 452

A suit for the reversal of a survey award and for recovery of possession alleging dispossession on a date *subsequent* to the date of the award is not governed by Article 45 or 46 but by the 12 years rule of limitation (Art 142)—*Mo affur v Girish* 10 W R 71 1 B L R A C 25

This Article will not enable a person to come in within 3 years from the date of the award and recover possession of lands in respect of which his suit is barred by other provisions of the law of limitation—*Beer Chand v Rangutty* 8 W R 209 *Maula Baksh v Keshoram*, 10 W R 249

In a thakbust map a land was demarcated as belonging to A B claimed that it belonged to him jointly with A On 18th November 1858 the map was rectified by demarcating the land to A and B jointly On 17th December 1865 A brought a suit against B for a declaration of his sole right and confirmation of possession and alleged that he had been in possession ever since It was held that a suit by a person in possession to have his *title confirmed* was not a suit to *recover property* within this Article and was not barred by reason of its not being brought within three years from the date of the award—*Mohima v Rajkumar* 10 W R 22

47—By any person Three The date of the final
bound by an order years order in the case
respecting the pos
session of immoveable
property made under
the Code of Criminal
Procedure 1898 or
the Mamlatdars
Courts Act 1906 or
by any one claiming
under such person to
recover the property
comprised in such or
der

336 Change —The word *immoveable* has been added in 1908 Under the old Act Article 47 referred to *immoveable* as well as *moveable* property—*Kangali v Zonurrudomissa* 6 Cal 709 But the Act of 1908 makes it apply to *immoveable* property alone

337 Application of Article —This Article is not confined in its operation to orders passed under Ch XII of the Cr P Code An order restoring

possession under sec 523 Cr P Code is an order respecting the possession of property within the meaning of this Article and must be brought within 3 years of the order—*Pakkir Adinarayana v Suramma* 48 M L J 372, A I R 1925 Mad 799 86 Ind Cas 744

Where the plaintiff had no legal right to possession at the time the order under sec 145 Cr P Code was made against him but subsequently acquired that right this Article would not apply to a suit for possession brought by him after he acquired such right Art 111 would apply to the case—*Bolai Chand v Samiruddin* 19 Cal 646

This Article has no application where the order of the Magistrate was passed without jurisdiction. But in order to evade the provisions of this Article it must be proved that the Magistrate's order was passed without jurisdiction in the strict sense of the term and not in the loose sense in which it is sometimes used in proceedings for the revision of orders under section 145 Cr P Code under the High Court's power of superintendence conferred by section 15 of the Charter Act. Thus in a proceeding regularly initiated under sec 145 Cr P C the parties filed written statements. The first party after some witnesses had been examined on his behalf applied to withdraw from the proceedings stating that he would conduct the case in a Civil Court and would not enter the land until the matter should have been settled by the Civil Court. The Magistrate reciting the above facts declared the second party to be in possession by an order passed in August 1906. The first party instituted the present suit in 1912 and contended that the suit was not governed by Art 47 because the Magistrate's order was passed without jurisdiction. It was held that the order was not passed without jurisdiction and that Art 47 barred the suit. Before want of jurisdiction can be pleaded a vice must be clearly established which vitiates the whole proceeding. When an inquiry has been duly entered upon under section 145 Cr P Code it is not every error that makes the result invalid—*Eyar Mahamad v Hayat Mahamad* 22 C W N 342, *Rani Abadi Begam v Ahmad Mir* 11 O L J 757 A I R 1925 Oudh 190. So also the mere fact that the Magistrate acting under sec 145 Cr P Code did not make the proper inquiries which he ought to have made before he passed the order or did not serve any notice on the plaintiff in accordance with law does not make the order illegal or without jurisdiction, especially when the plaintiff had notice of the proceedings and put in a written statement before the Magistrate. A suit to recover possession of property comprised in such order falls under this Article—*Parasuramayya v Ramachandradu* 38 Mad 432. See also *Gangaram v Sankarappa* 9 M L J 91.

This Article does not apply where there was no order by the Magistrate declaring one of the parties to be entitled to possession of property. Thus a Magistrate who, finding himself unable to determine who was in actual possession of certain lands, attaches those lands under sec 146

nissa 6 Cal 709 It was also held that time ran from the date of the Magistrate's order and not from the date on which a rule issued by the High Court under sec 15 of the Charter Act against the Magistrate's order was disposed of because an order of the Magistrate under sec 145 of the Cr P. Code is a final order within the meaning of this Article since it was not subject to appeal review or revision and the Charter Act was not contemplated by the Legislature when they drew up the provisions of Art 47—*Jagannath v Ondal Coal Co Ltd* 12 C W N 840 But these two rulings are no longer good law because under the Criminal Procedure Code as amended in 1923 orders under section 145 passed by a Magistrate are not final but are open to revision under the Code itself

When once limitation has begun to run the plaintiff will not be entitled to a fresh starting point from the date of attachment by the Criminal Court—*Deo Narain v Webb* 28 Cal 86

If the defendant against whom an order has been passed by the Mamlatdar fails to bring a suit under this Article for the recovery of the property within three years his title to the property is not extinguished Consequently if he gets into possession again such possession should be referred to his then subsisting title and any one who after his re entry disputes his title will have to prove his own as against the title of the defendant independently of any question of limitation arising under this Article—*Parashram v Rakhma* 15 Bom 299 (304)

48—For specific moveable property lost or acquired by theft, or dishonest misappropriation or conversion or for compensation for wrongfully taking or detaining the same	Three years	When the person having the right to the possession of the property first learns in whose possession it is
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341 Specific moveable property — Specific moveable property means property of which you may demand the delivery in specie—*Sural v Umar* 22 Cal 877 (at p 882) *Essoo v Steam Ship Savitri* 11 Bom 133 (137) It means property which can be specified by the delivery of the identical subject and does not cover money—*Agandh Mahto v Khajah Ahjullah* 11 C W N 862 (dissenting from *Rameswar v Mala Bhis* 5 All 341) *Lala Gobind v Chairman* 6 C L J 535 *Sankunni v Gobinda* 37 Mad 381 *Jagjivan v Gulam Jilani* 8 Bom 17 (19)

In some cases however money has been held to be included in specific moveable property See *Ram Lal v Ghulam Husain* 29 All 579 *Tula v Mohri* 7 Ind Cas 5 *Rameswar v Mala Bhis* 5 All 341

G P Notes and title-deeds are specific moveable property—*Gopal v Surendra* 12 C W N 1010 *Subbakka v Morupakkala* 15 Mad 157

342 Limitation —Limitation runs from the time when the plaintiff first learns in whose possession the property is Where plaintiff entrusted a certain jewel to a person for sale and the latter pledged it for his own use a suit by the plaintiff to recover the jewel or its value from the pawnee is governed by this Article and would be in time if brought within three years from the date on which the plaintiff knew that the jewel was in the possession of the pawnee—*Seshappier v Subramania* 38 Mad 783 affirmed on appeal in 40 Mad 678

It is for the plaintiff to prove the facts which would bring the claim within time it is for him to show that he had first had the necessary knowledge within three years prior to the suit—*Bank of Bombay v Fatalbhoy* 24 Bom L R 513 (per Shah J)

343 Cases —The brother of the defendant had appropriated to his use certain goods of the plaintiffs and after his death the defendant sold the goods and held the sale proceeds as agent for his deceased brother's widow The plaintiffs brought a suit to recover the moneys Held that the case did not come under Article 48 because there was no dishonest misappropriation or conversion by the defendant the defendant sold the goods on account of his brother he held the proceeds on account of his brother's widow There was no dishonest conduct on the part of the defendant although the plaintiffs had a right finding the money in his hands to make him responsible for it The suit fell under Article 120—*Gurudas v Ram Narain* 10 Cal 860 (P C) at p 864

A 5 per cent G P Note for Rs 3 800 was deposited in Court and was lost by the Court Many years afterwards it was traced and it was found that it stood in the name of one who had converted it into a 3½ per cent G P Note for Rs 4 100 Thereupon the plaintiff instituted a suit against him The defendant pleaded that he purchased the Note in good faith from one since deceased Held that the suit did not fall under this Article as there was no proof of theft or dishonest conversion—*Chandra Kall v Chapman* 32 Cal 799 (814)

A suit for value of coal wrongfully extracted and carried away is governed by this Article—*Lodna Colliery Co v Bipin Behari* 1 P L T 84

A suit to recover the price of materials of a house removed and misappropriated by the defendants must be brought within the period prescribed by this Article—*Tafazul v Mahamed* 52 Ind Cas 361 (Pat)

A suit against an innocent person to recover stolen property or its value as damages falls under this Article and time runs from the date the plaintiff knew that the property had come into the defendant's possession—*Sohan Singh v Mull Singh* 1911 P W R 148

Where in pursuance of the directions of a will the executors deposited a number of G P Notes in a Bank to accumulate until the minor legatee

attained majority but some time before that event they got the G P Notes sold by the Bank and drew out the amounts held that a suit by the legatee against the Bank for the amounts thus drawn out must be treated as one for conversion to which Art 48 would apply If it is to be treated as a suit for money received by the defendant as sale proceeds and properly payable to the plaintiff Article 62 would apply—*Bank of Bombay v Fazalbhoy* 24 Bom L R 513 67 Ind Cas 761 A I R 1923 Bom 155

49—For other specific moveable property or for compensation for wrongfully taking or injuring or wrongfully detaining the same	Three years	When the property is wrongfully taken or injured or when the detainer's possession becomes unlawful
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345 Specific moveable property —See notes under Art 48

Legacy —A suit to recover specific moveable property from one who is in unlawful possession thereof is governed by this Article even though the property is the subject of a legacy Art 123 does not apply to such a suit—*Issur v Juggut* 9 Cal 79

Idols —A suit for recovery of the Thakurs of a temple from the possession of the defendants is not governed by this Article in as much as the Thakurs (idols) are not specific moveable property but are considered as judicial persons especially in a suit like the present where the Thakurs are themselves made plaintiffs—*Bali Panda v Jaduman* 38 Cal 284

Account books and mortgage-deeds are specific moveable properties —*Durga Devi v Ram Nath* 85 P R 1919

346 Wrongful taking —Where under the erroneous order of the Magistrate the defendant took possession of the property he was guilty of wrongful taking which gives the true owner a cause of action In such a case time runs under Art 49 from the date when the property is wrongfully taken—*Ramasamy v Muthusamy* 30 Mad 12 But *quaere* whether the receipt was *wrongful* Compare 3 C L J 182 cited under Article 10)

Where trees are wrongfully cut down and subsequently the wood so lying on the ground is wrongfully taken the suit for compensation will be in time under this Article if brought within three years of the wrongful taking—*Aiyappa Reddi v Kuppusami* 28 Mad 208

The plaintiff was the owner of a house which was mortgaged to defendant In August 1885 defendant took the key of the house from the plaintiff and sold it under a power of sale contained in the mortgage deed In the house there had been stored a certain quantity of timber not mortgaged which was not returned to the plaintiff after the sale The plaintiff brought a suit in September 1887 to recover the value of the timber alleging that

the defendant had taken it and converted it to his ¹ own use. Held that the suit was one for compensation for wrongfully taking specific moveable property under this Article and not governed by Article 36—*Passanha v Madras and Benefit Society* 11 Mad 333

347 Injury.—This Article applies only to suits in respect of plaintiff's property in the hands of some other person and not to suits in respect of property in the plaintiff's own possession and the injury to property mentioned in this Article is limited to cases of injury to property while in the custody of some person other than the owner. Therefore a suit for compensation for damage done to a ship of the plaintiff (while it was in his possession) by collision with the defendant's ship on the high seas does not fall under this Article but under Article 36—*Essoo v Steam Ship Saurin* 11 Bom 133 (137)

348 When the detainer's possession becomes unlawful.—The defendant's possession of the plaintiff's property does not become unlawful until the property is demanded by the latter and refused by the former. Mere detention is not unlawful—*Maganlal v Thakurdas* 7 Ind Cas 447

Mere silence on the part of the defendant on demand of the moveable property being made does not constitute refusal to deliver up the property. Time runs when there is a definite refusal to do so—*Gopalasami v Subramania* 35 Mad 636

Where moveables are entrusted to any person on the condition that they will be returned on the expiry of a specified period the mere fact that they are detained beyond that period does not render the detainer's possession unlawful. It is only when a demand is made and there is a refusal to comply with the demand that the defendant's possession becomes unlawful and limitation runs from the date of such refusal—*Laddo Begum v Jamaluddin* 42 All 45. Where the possession of a jewel by the defendant was originally permissive the character of that possession would not be changed by the fact that he subsequently set up a claim to the jewel as his own property. His bare assertion that the jewel is his own property does not make his possession unlawful. His possession becomes unlawful only when there is a formal demand for return of the jewel and a refusal to comply with it. Under this Article time would begin to run from the date of his formal refusal to comply with the demand—*Ma Mary v Ma Hla* 2 Rang 555 & 1 R 1925 Rang 146 85 Ind Cas 10

The mere non payment of the rent of a machine does not amount to a wrongful taking or detaining of it the cause of action arises only when the machine is demanded back and refused—*Singer Manufacturing Co v Flynn* 13 A L J 81

A testator bequeathed certain specific moveable property to A which A sold to C. B obtained a certificate under Act XXVII of 1860 and took possession of the property. The certificate was cancelled and B was ordered to hand over the property to A or his vendee C on the 19th August 1873

C instituted his suit on the 22nd March 1878. It was held that the suit fell under this Article and time began to run from 19th August 1873, the date of the Court's order, from which time B's possession became unlawful—*Issur v Juggul*, 9 Cal 79

B sold moveable and immoveable properties to A, but instead of putting him in possession, sold the properties to C and put him in possession. A brought a suit for specific performance against B and C in which he obtained a decree, but as C still continued in possession of the moveable property, B brought a suit against him to recover it. Held that C's detainer became unlawful from the date of the decree for specific performance—*Dhondiba v Rama Chandra*, 5 Bom 554

After the redemption of a mortgage, the title deeds of the mortgaged premises remained with the mortgagee, who on demand for their return refused to give them up. A suit for recovery of the deeds was held to be governed by this Article and time began to run from the date of demand for the deeds, after which their retention became unlawful—*Subbappa v Marupphakkala*, 15 Mad 157

349 Deposit.—Where the transaction amounts to a deposit, the more specific Article 145 (and not the general Article 48 or 49) applies. Thus, a suit to recover moveable property deposited with the defendant for safe custody or in the alternative for its value, is governed by Article 145 which is more specific than Article 48 or 49. Even the fact that there has been a demand for the return of the deposit and a refusal to return by the depositary, which makes the defendant's possession wrongful, does not attract the provisions of section 49 so as to make the suit as one "for specific moveable property or for compensation for wrongfully detaining the same"—*Narmadabai v Bhabanishankar*, 26 Bom 430; *Ganginani Kondiah v Gottipati Pedda*, 33 Mad 56. But in an exactly similar case, where the plaintiff handed over some jewellery to the defendant for safe custody, the Allahabad High Court held that a suit for recovery of the jewellery or its value was governed by Article 49—*Laddo Begam v Jamaluddin*, 42 All 45. No reference was made in this case to Article 145 or to the Bombay and Madras cases cited above.

Where the defendant who was entrusted with a jewel to pledge it and raise loan on it on behalf of the plaintiff, did so, but after the plaintiff repaid the loan, the defendant got back the jewel from the pledgee but did not return it to the plaintiff though demand was made for its return, it was held that as there was no agreement that the jewel should remain in deposit with the defendant after the repayment of the loan, Article 145 would not apply to a suit to recover the jewel, but Art 49—*Gopalasami v Subramania*, 35 Mad 636

See *Administrator-General v Krishna Kamini*, 31 Cal 519 cited in Note 628 under Art 145. See also Note 630 under Art 145 where the distinction between Arts 145 and 49 has been pointed out.

350. Where Article does not apply —This Article is inapplicable where the plaintiff has not strictly speaking a personal claim to the property, as for instance, where he claims it in a representative capacity as the shebait of a temple—*Gossami Sri Gridharaj v Ramanlalji*, 17 Cal. 3 (P C)

A suit by an heir of a Mahomedan to recover a fourth share of certain specified moveable properties left by the deceased is really a suit for partition of those properties, and falls under Article 120, not under this Article —*Bashirunnissa v Abdur Rahman*, 44 All 244

A suit by a Mahomedan widow against the brother of her deceased husband, for a declaration of her life interest in the estate of her husband according to local custom, is not governed by Article 49, as this Article is not applicable to a suit to establish a right to inherit the property of a deceased person, nor is it a suit for distributive share of property under Art 123 The suit falls under Art 120—*Mahomed Riasat Ali v Hasin Banu*, 21 Cal 157 (P C) at p 163

A suit against a Navigation Company for compensation for non-delivery of a lumber which is not in the possession of the company, is governed by Article 31, and not by this Article since the property is not in the detainer's possession—*Venkalasubba v Asiatic Steam Navigation Company*, 39 Mad 1 (F B) Even if Article 49 were applicable, its operation would be excluded by the provisions of Article 31, which is more specific—*Ibid*

A suit for compensation for wrongful seizure of a ship under an order of Court is governed by the more specific Article 29 rather than Article 36 or 49—*Madras Steam Navigation Co Ltd v Shalimar Works Ltd*, 42 Cal 85 (108)

Where in consequence of a quarrel arising between the plaintiff (a fruitseller) and the haddar of the market about the payment of tolls, the latter informed the police and the result was that the boat of oranges brought by the plaintiff was detained at the thana for some days, and while so detained the oranges deteriorated, and then the plaintiff brought a suit against the haddar for compensation, held that Article 49 did not apply because the plaintiff did not bring this suit to recover any specific moveable property, and it was the police and not the defendants who took the oranges to the thana and detained them there The suit falls under Article 36—*Ananda Charan v Barada Kanta*, 42 C L J 203, 90 Ind Cas 509, A I R 1926 Cal 177

A suit for compensation for wrongful attachment before judgment falls under Article 29 and not under Article 49 The latter Article applies to a case in which moveable property is wrongfully taken or detained by the defendant (i.e. by a private person), and not by the Court in execution of a legal process—*Ram Narain v Umrao Singh*, 29 All 615 (617), see also *Narasingha v Gangaraju*, 31 Mad 431 (at p 438) In *Manavikraman v. Avisilan*, 19 Mad 80 (at p 82) such a suit was held to fall under Article

49 the Judges remarked that since the attachment was made at the instance of the defendant, the attachment might be said to have been made by the defendant and it was immaterial that it was effected through a process of the Court. It was further held in this case that Article 29 did not apply.

As to whether this Article governs a suit for wrongfully cutting and carrying away crops see notes under Article 36 where the subject is fully discussed.

50 —For the hire of animals, vehicles, boats, or household furniture	Three years	When the hire becomes payable
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51 —For the balance of money advanced in payment of goods to be delivered	Three years	When the goods ought to be delivered
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351 If there be no date specifically fixed for the delivery of the goods, evidence must be taken as to the time when the goods ought to be delivered—*Basiddonath v Lalunnessa* 7 W R 164

52 —For the price of goods sold and delivered, where no fixed period of credit is agreed upon	Three years	The date of the delivery of the goods
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352 A suit for payment of a bill of goods supplied by retail by an ordinary trader is governed by this Article—*Shama Churn v Collector*, 1 W R 308. A suit to recover price of goods supplied by a tradesman on credit for which payments were made on presentation of bill, is governed by this Article and not by Art 85 and the period of limitation is three years from the date of delivery—*Dansford v Shaw & Co*, 88 Ind Cas 747 A 1 R 1925 Pat 806. Where a tradesman supplies goods from time to time on credit to a customer who makes payments from time to time on account no fixed period of credit being agreed upon, the cause of action in respect of each supply must be taken to arise under this Article on the date when each item of goods was supplied. But if there be an implied contract that all the goods supplied within a certain period are to be paid for after the expiration of that period then limitation would run from the expiry of the period of credit (Art 53)—*Salcovee v Kristo*, 11 W R 529.

Where a suit is brought against the son for the price of goods sold and delivered to the deceased Hindu father, this Article would apply but if a decree were obtained against the father, a suit against the son on the cause of action arising from the decree against the deceased father—the decree being a debt which the son is, according to Hindu Law, under an obligation to discharge—is governed by Art 120—*Periasami v Seetharama*, 27 Mad 243 (F B)

A suit for recovery of the price of fruits standing in a garden and sold to the defendant is governed by this Article, the word goods being wide enough to include fruits even before they have been gathered—*Wasu Ram v Rahim Baksh*, 66 Ind Cas 120 (Lah)

Where grain is advanced on a contract that it should be repaid in kind, it is not a case of goods being 'sold' within the meaning of this Article. The word 'sold' in this Article refers to a case in which the contract is to pay for the price in money. A suit for the recovery of the value of the grain advanced falls under Art 65 or 115—*Mid Din v Sohan Singh*, 65 Ind Cas 691, A I R. 1922 Lah. 271

A suit to recover arrears of subscription of a newspaper is governed by this Article—*Hormasy v Kharseli*, 7 Bom L R 190

A suit for the price of work done and goods supplied under some contract entered into by the plaintiff with the defendants for the supply of labour and materials for repairing and constructing certain buildings is governed by Article 52 so far as the price of goods is concerned and by Article 56 in respect of price of work done. If the plaintiff has a lien on the buildings for the money due, a suit for the enforcement of that lien is governed by Article 132—*Daulat Ram v Woollen Mills* 95 P R 1908. But where the claim for the price of work done and for the price of goods supplied is inseparable and indivisible, the suit is neither governed by Article 52 nor by Article 56 but is governed by the comprehensive Article 115. Thus, the defendant employed the plaintiff as a contractor to do the work of flooring in a building the plaintiff was to supply marble and other stone required for the flooring and was also to do all the work necessary for constructing the floor and was to be paid a certain sum of money for every square foot of the flooring done by him which rate included both the price of materials supplied and the work done by the plaintiff. The plaintiff sued for a sum of money due to him on the basis of this contract, and the plaint made no mention of the price of the materials as distinct from the price of the work. *Held* that the claim as laid in the plaint was an indivisible one, it could not be split up into two portions, consequently it fell neither under Article 52 nor under Article 56 but was governed by Article 115, which is a general provision applying to all actions *ex contractu* not specially provided for otherwise—*Mid Ghasita v Serajuddin* 2 Lah 376 (381, 382), 66 Ind Cas 490 A I R 1922 Lah 198 (F). In an earlier case, viz *Radha Kishen v Basant Lal*, 103 P R 191

was held that a suit for the recovery of a sum of money alleged to be due for the price of work done and goods supplied was governed by Article 120 because no single Article (52 or 56) covered the entire claim. Article 56 did not cover the price of goods supplied and Article 52 did not cover the price of work done. This decision should now be deemed as overruled by the Full Bench case cited above.

53 —For the price of goods sold and deli vered to be paid for after the expiry of a fixed period of credit	Three years	When the period of credit expires
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353 Where the contract was that the plaintiff would supply wood to the defendants and further that he would indemnify the defendants for loss arising by failure on his part to supply wood it was held that the intention of the parties having been that the price of wood was not claimable as of right on the date of its being supplied but rather when the contract was completed by the whole wood being supplied or when the contract came to an end a suit for the price of the wood was not governed by Art 52 but by this Article—*Prags v Maxwell* 7 All 284

A vendor sent to his vendee a bill for some piece goods purchased and at the top of the bill appeared the words debit interest at $\frac{1}{4}$ per cent per month after 60 days *thavanai*. In a suit for money due the question arose whether it was a credit sale or a cash transaction. *Held* that the word *thavanai* meant credit period and the suit was governed by Art 53—*K M P R N M Firm v Somasundaram* 48 Mad 275 47 M L J 844 A I R 1925 Mad 161 85 Ind Cas 299

54 —For the price of goods sold and deli vered to be paid for by a bill of exchange, no such bill being given	Three years	When the period of the proposed bill elapses
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55 —For the price of trees or growing crops sold by the plaintiff to the defendant where no fixed period of credit is agreed upon	Three years	The date of the sale
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56 —For the price of work Three When the work is done
 done by the plaintiff years
 for the defendant at
 his request where no
 time has been fixed for
 payment

354 A suit by a goldsmith to recover the price of his labour in making ornaments falls under this Article—*Vishnu v Gopal* 1885 P J 252 so also a suit by a printer to recover costs of printing—*Ambica v Nitya Nand* 30 Cal 687

A suit by a Zemindar to recover sums expended by him at the defendants request for the repair of a tank for the irrigation of lands held by them in common with him is a suit for work done at the defendants request and governed by this Article—*Sundaram v Sankara* 9 Mad 334

As regards a suit by a contractor for recovery of price of work done for constructing and repairing certain buildings as well as for price of materials see notes under Article 52

Where the plaintiff a contractor was engaged by the defendant to do some work for the defendant's principal who was a Ruling Prince and the plaintiff was refused permission by Government to sue the Prince, a suit against the agent (defendant) was maintainable and it fell under this Article—*Abdul Ali v Von Goldstein* 43 P R 1910

57 —For money payable Three When the loan is made
 for money lent years

355 Scope —Arts 57 and 59 are applicable to loans payable *on demand* therefore a suit to recover money lent with interest upon a verbal agreement that the loan should be repaid within one year is not governed by this Article but by Art 115—*Rameshwar v Ran Chand* 10 Cal 1033 *Ramasami v Muthusami* 15 Mad 380

356 Pledge —A suit for money lent under Art 57 would not be less so where the money lent is secured by a pledge the period of limitation for such a suit would be three years from the date of the loan Thus in a suit by a pawnee to recover the balance due on his debt after accounting for the proceeds of the sale of the articles pledged it was contended by the plaintiff that the time ran under this Article from the date of the sale because it was only then ascertained that any balance was due on the original loan but the Court held that time ran from the date of the loan The suit was one to recover the unpaid balance of a loan and the fact that moveable property had been pledged did not change the nature of the

suit—*Sayid Ali v Debt Prasad*, 24 All. 251, *Yellappa v. Parasharamappa*, 30 Bom 218

Where the suit on a pledge of certain moveable property is to recover the amount due by sale of the property pledged as also for a personal remedy against the defendant for recovering any balance which may remain due after such sale, the suit will be governed by Art 57 so far as the personal remedy is concerned, and by Art 120 so far as the remedy by sale of the pledged property is concerned—*Nim Chand v Jagabandhu*, 22 Cal 21, *Madan Mohan v Kanhai Lal*, 17 All 284; *Mahalinga v. Ganapathi*, 27 Mad 528 (F B) If the personal remedy is barred, a right to enforce the charge against the property will still exist—*Nim Chand v Jagabandhu*, 22 Cal 21 (dissenting from *Vilja Kanthi v Kalekar*, 11 Mad 153)

Thavanas accounts —A suit for money lent on a *thavanas* account is governed by Art 60 and not by this Article See Note 362 under Art 60

58.—Like suit when the lender has given a cheque for the money	Three years	When the cheque is paid.
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357 This Article is the same as in English Law Time runs when the cheque is paid and not when it is given, and the reason for the law is that if the loan was considered as made when the cheque was given, the lender might sue for it at once before the cheque was presented, and on presentation the cheque might be dishonoured—*Garden v Bruce*, L R 3 C P 300

59.—For money lent under an agreement that it shall be payable on demand	Three years	When the loan is made.
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See notes under Art. 60

358 The words 'on demand' have been used in this Article in the legal sense of the term, i.e., forthwith and without demand—*M Chetty v Palaniappa*, 13 Bur L T 21 According to the Law of England, when money is payable "on demand" and nothing further is said, it is payable at once and without demand, and time under the statute of Limitations begins to run at once. The most common instances of the application of this principle are of money lent repayable on demand or at request, and promissory notes payable on demand This principle has been applied by Articles 59 and 73 to cases of money lent and bills of exchange and promissory notes payable on demand—*Secretary of State v Radhika Prasad Bapuli*, 46 Mad 259 (288)

60 —For money deposited under an agreement that it shall be payable on demand including money of a customer in the hands of his banker so payable	Three years	When the demand is made
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Change —The words including money of a customer in the hands of his banker so payable did not exist in the Act of 1877 For reason of this change see Note 361 below

359 Money —Specific coins e.g. gold mohurs entrusted to a bailee for a given purpose to be returned in specie will be treated as money within the meaning of this section—*Kalyan Mai v Kishen Chand* 41 All 643 (643)

360 Deposit and loan —There is a good deal of difficulty in ascertaining whether a suit comes under Article 59 or Article 60 It is not clear what the Legislature meant by the word deposited in Article 60 but there must be some difference between money lent and money deposited and a plaintiff relying upon Article 60 must prove that something took place between the parties at the time the money passed which would constitute the handing over of the money a deposit and not a loan It has been suggested that the difference between a loan and a deposit is that the borrower who takes money on deposit stands in a fiduciary relationship to the lender That might either arise from a direct agreement or might be implied from the circumstances in which the money came to the hands of the borrower Ordinarily when A hands over money to B on the understanding that it is not a gift but has to be repaid when demanded that would be considered in law a loan and when the plaintiff seeks to prove that the money so handed over was a deposit the onus would be upon him to prove that there were additional circumstances which turned the loan into a deposit There is no distinction in this Act between a money lent and money deposited as regards the agreement to repay so that it is not the agreement that the money should be payable on demand that distinguishes a deposit from a loan There must be something further proved and it is not possible to define exactly what that something further must be—*Chinsana v Kachubhai* 23 Bom L R 503 73 Ind Cas 978 A I R 1924 Bom 28

A deposit is a loan and something more i.e. the depositor stands in a fiduciary relation to the depositor therefore where the plaintiff claimed to recover from the defendant who was his grand father a certain sum which was the amount standing to his credit in the defendant's books

and it was found that these sums were presents which had been made to him on his birthday and from time to time paid over to the defendant by the plaintiff's mother (defendant's daughter) and that these sums were carried over from year to year in the defendant's books, the interest being added each year, it was held that the defendant stood in a fiduciary position to the plaintiff, and therefore there was a *deposit* within the meaning of this Article and not a loan, and limitation did not commence to run until demand—*Dorabai v Mancherji*, 19 Bom 352, affirmed on appeal in *Mancherji v Dorabai*, 19 Bom 775

Similarly, where the grand-father of one P intended to make a gift to her of Rs 1000 and in fact made the gift and asked the defendant who was a relation of his to hold the money for her and to give it to her when she attained her majority, or when she might demand it, with interest at a certain rate it was held that the transaction was clearly in the nature of a deposit of money in the hands of the defendant, and this Article applied—*Narayanan v Vellayappa*, 1916 M W N 206

Where one M entrusted his nephew S a rich money-lender, with some money for investment, and the latter accordingly first deposited the amount with a third party but subsequently withdrew it and invested it in his own firm, there being no evidence as to the exact terms on which the money was handed over, *held* that the presumption was that the money was deposited on terms that it should be payable on demand and the suit for its recovery fell under this Article—*Ramanathan v Subramanya*, 28 M L J 372

The plaintiff from time to time kept money with the defendants for safe custody. The defendants were at liberty to employ the money in their own business and in case they did so they were to pay a certain interest on the money so employed. *Held* that the relation between the parties was not that of lender and borrower, as the defendants did not take the money for their own benefit and did not agree to pay interest for it themselves. The transaction was in the nature of a deposit under Article 60—*Jogendra v Dinkoo Ram* 25 C W N 981

Where the plaintiff bailed 400 gold mohurs with the defendant for specific purposes, and on demand being made, the delivery was refused, it was held that the suit for the return of those mohurs or for their value was a suit for 'money deposited under an agreement that it shall be payable on demand' and that this Article governed the case—*Kalyan Mal v Kisen Chand*, 41 All 643

361. Banker and customer.—There was a conflict of opinion as to whether the relationship between a banker and customer was that of depositee and depositor under Article 60 or of borrower and lender under Article 59. In *Issur Chunder v Jiban* 16 Cal 25 and *Perundevitayar v. Nammalvar*, 18 Mad 390, it was held that the transaction was in the nature of a deposit, but in *Ichha v Natha*, 13 Bom 338, *Dharam v. Ganga*,

29 All 773 and *Chandu v Chanda* 95 P R 1885 the relationship was held to be that of borrower and lender. Thus conflict has been set at rest by the addition of the words 'including payable' in Article 60 so that a banker is now regarded as a depositor—*Juggi Lal v Kishen Lal*, 37 All 292.

The word 'banker' in this Article does not mean a professional banker. It is not necessary to prove that the defendants were carrying on business only as bankers. A man might become a banker or place himself in the position of a banker with regard to a particular customer, and if the dealings between the lender and the borrower are such that the Court is satisfied that it could be said that the borrower is in the position of a banker to the lender, then the money so lent could be considered as a deposit. Where the evidence shows that the plaintiff was lending money to the defendants at a low rate of interest, and the defendants were lending out that money and other money deposited in a similar fashion at a higher rate, held that it was exactly in the nature of a banker's business—*Bhimanna v Venichand*, 28 Bom L R 73, 93 Ind Cas 215 A I R 19 6 Bom 168.

Money left in the hands of a trader who is not a banker, under circumstances such as would make it the money of a customer if the depositor were a banker will be considered as a deposit and a suit to recover money so deposited will fall under this Article—*Subramanian v Kadiresan*, 39 Mad 1081 (1084), 30 M L J 245, 32 Ind Cas 965.

362. *Thavanas* account.—The custom of *thavanas* transaction among *Nattukottai Chetties* is that the deposit is made for a fixed and certain period of two months at the rate of interest which is fixed weekly by members of the Chetty community, the depositor cannot demand repayment before the end of two months for which he has deposited the money. If the depositor does not demand it at the end of the term, and the depositor does not elect to repay it then the deposit is taken to be extended for another period of two months, the rate of interest to be fixed by the weekly meeting of the community, and so on until the money is repaid.

A suit for money due under a *thavanas* transaction is governed by Art. 60 or 115 (and not Art. 57). It is not clear whether the money deposited on a *thavanas* account is repayable at once upon demand, or is repayable only after the expiration of the current *thavanas* period when the demand is made. In the former case, Art. 60 would apply, and time would begin to run from the date of demand and in the latter, time runs under Art. 115 from the expiry of the current *thavanas* period when the demand is made—*Muthia v Ramanathan*, 1918 M W N 242, *Vellayappa v Unnamalai*, 1917 M W N 858 *Annammalai v Annammalai*, 10 L. W. 67. In a Burma case it has been held that money deposited on a *thavanas* account is not repayable until the end of the period of deposit when the demand is made, and a suit to recover money deposited on *thavanas* account is governed by Article 60, and must be brought in

three years from the time when the demand is made—*M Chetty v Palaniappa* 13 Bur L T 21

In *Chellappa v Subramanian* 1913 M W N 564 it has been held that the suit is governed by Article 60 and not other because the money deposited on the understanding that it is to be paid on demand after the expiry of a fixed period does not cease to be a deposit payable on demand within the meaning of Art 60

It is clear that Art 57 cannot apply because under that Article time runs from the date of the loan whereas in *thavanas* accounts time runs *ex hypothesi* from the expiry of the *thavanas* period besides the transaction is more in the nature of a deposit than a loan and the Natukottai Chetties are bankers within the meaning of Art 60—*Vellayappa v Unnasalas* 1917 M W N 858

In cases of deposit on *thavanas* where the agreement is that interest is not to be paid until demanded but should be added to the principal the whole amount being treated as a fresh deposit at the end of each *thavanas* it is held that the proper Article applicable to a suit for recovery of the principal and interest is Art 60 and not that the claim for interest is governed by Art 63—*Narayanan v Subbiah* 43 Mad 679

363 On demand —In Article 59 the term on demand is used in its legal sense i.e. forthwith and without demand but Article 60 applies to cases of deposit of money repayable on demand in the popular sense of the term i.e. after actual demand is made—*M Chetty v Palaniappa Chetty* 13 Bur L T 21

61 —For money payable Three When the money is paid
to the plaintiff for years
money paid for the
defendant

364 Contribution suits —A contribution suit brought against the co parceners by the managing member of a family who was compelled to pay the whole family debt is governed by this Article—*Tirupathiraju v Rajagopala* 8 M L J 271

Where money is paid by one of the joint owners of an undertenure on account of decrees for rent and revenue in arrears to save the estate from sale a suit by him for contribution against the other owners falls within this Article—*Sukhamon v Ishan* 25 Cal 814 (P C) at p 851

A suit by the plaintiff to recover the money which he has paid in excess of his own moiety for the expenses of certain temple held jointly by him and the defendant which excess the defendant ought to have paid is governed by this Article and the fact that it may be necessary to examine certain accounts cannot by itself render the suit one for account—*Rasiah Lalji v Gopal Lalji* 19 All 244

Under an award the plaintiff was to clear a canal common to himself and the defendant and to recover a certain share of the costs from the defendant. Plaintiff cleared the canal and brought the present suit to recover from the defendant his share of the sums expended in such clearing. *Held* that the suit fell under this Article—*Tulsidas v Wardari* 14 S L R 19

The plaintiff and the defendant jointly owned a well. They entered into a registered agreement to the effect that the necessary repairs were to be made by both the owners. In 1911 the well having fallen into a state of dilapidation the Municipality gave notice to the parties to repair it and the plaintiff alone paid the whole costs for the repair. In 1916 he brought a suit to recover from the defendant his contribution to the expenses of the repairs. It was held that the suit was barred since it was really a suit for contribution governed by this Article. It was not covered by Article 116 because although the original indebtedness arose out of the registered contract yet the claim upon which the action is based rests not upon the registered contract but upon the promise which the law implies on the part of the co-owners to share equally the expenses of the repairs—*Sury Prasad v Karamnoli* 43 Bom 591 (1924)

A suit for contribution by a partner of a firm who has paid the whole or more than his share of the amount due from all the partners falls under this Article—*Walsali Ram v Rani Kishori* 5 Lah L J 310 72 Ind Cas 385

365 Other suits.—Where the contract of agency is contained in a registered deed but the contract does not provide for any obligation on the part of the principal to indemnify the agent a suit by the agent for recovery of money paid by him for the principal in meeting the expenses of the principal's litigation is governed by this Article and not by Article 116. The right of suit is conferred by section 70 of the Contract Act—*Kandassami v Ayyammal* 34 Mad 167

A suit to recover revenues paid by the plaintiff while he was in possession of immovable property under an order of Court but of which he was subsequently dispossessed by reason of the order being reversed falls under this Article and not under Article 97 and time runs from the date of the last payment—*Aiyar v Bibi Kunwar* 42 All 61

Where the mortgagee leaves a specific portion of the consideration money with the mortgagee to pay off certain creditors and the mortgagee fails to make such payments in consequence of which the mortgagee to save his property makes the payment himself a suit by him to recover the money so paid from the mortgagee falls under this Article and time runs from the date of actual payment and not from the date of the mortgage—*Sayji Mirsa v Ghulam Hussain*, 63 Ind Cas 57 (All) Similarly where a registered sale deed provided that the purchaser should pay the revenue on the land sold but the vendor paid the revenues

payment made by the plaintiff and any later payment made by the defendant towards the joint liability would not enure for the benefit of the plaintiff or save limitation—*Marudas v Chinnakannu* 1919 M W N 429

Where the payment is involuntary, & where the plaintiff's property is attached and sold and the sale proceeds paid over to the decree holder, time will begin to run from the date when the sale proceeds were drawn by the decree holder from Court, and not from the date of the sale of the property of the plaintiff—*Pattabhiranayya v Ramayya* 20 Mad 23 (following *Fuckorudeen v Mahima Chunder* 4 Cal 50)

62—For money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use	Three years	When the money is received.
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358 The language of this Article is borrowed from the form of count formerly in vogue in England under the Common Law Procedure Act, 1852. This count was applicable where a defendant received money which in justice and equity belonged to the plaintiff under circumstances which rendered the receipt by the defendant to the use of the plaintiff. It was a form of suit which was adopted when the plaintiff's money had been wrongfully obtained by the defendant as for example when money was exacted by extortion or oppression or by abuse of legal process or when overcharges were paid to a carrier to induce him to carry goods, or when money was paid by the plaintiff in discharge of a demand illegally made under colour of an office. It was a form of claim which was applicable when the plaintiff's money had been wrongfully obtained by the defendant, and the plaintiff in adopting it waived the wrong and claimed the money as money received for his use—*Rajputana Malwa Railway Stores v Ajmere Municipal Board*, 32 All 491 (at p 496). See *Mosses v Macfarlane*, 2 Burr 1005 (1010), *Morgan v Palmer*, (1824) 2 B & C 729, 26 R R 537, *Neale v Harding* (1851) 6 Ex 349, 86 R R 328, *Bunan Chandra v Promotha*, 49 Cal 886 (889) 36 C L J 295.

In an action for money had and received there must be privity of a legal recognizable nature between the plaintiff and the defendant—*Ramasami v Muthusami*, 41 Mad 923. This Article applies if there exists such privity between the plaintiff and the defendant, so that the defendant may be said to have held the money in trust for the plaintiff—*Nisgal Singh v Secretary, Gurudwara*, 42 Ind Cas 731, A I R 1926 Lah 228.

369 Scope.—This Article would apply where the money was received by the defendant for the plaintiff himself if the receipt had been for some-

payment made by the plaintiff and any later payment made by the defendant towards the joint liability would not enure for the benefit of the plaintiff or save limitation—*Marudai v Chinnakannu* 1919 M W N 429

Where the payment is involuntary, & g where the plaintiff's property is attached and sold and the sale-proceeds paid over to the decree-holder, time will begin to run from the date when the sale-proceeds were drawn by the decree holder from Court, and not from the date of the sale of the property of the plaintiff—*Pattabhiramayya v Ramayya*, 20 Mad 23 (following *Fuchoruddeen v Mahima Chunder*, 4 Cal 520)

62—For money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use	Three years	When the money is received.
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369 Scope —This Article would apply where the money was received by the defendant for the plaintiff himself if the receipt had been for some

behalf of the purchaser and sued him for the revenue paid *held* that the suit was not governed by Article 116 but by this Article and the plaintiff could not claim costs for more than three years prior to the date of the suit—*Ukharam v Ukharam* 51 M L J 159 94 Ind Cas 1046 A I R 1926 Mad 633

Where a prior mortgagee sues upon his mortgage impleading the puisne mortgagee and obtains a decree for sale and the puisne mortgagee pays off and discharges the decree he thereby acquires on the principle of sections 74 and 95 of the Transfer of Property Act a charge upon the property which he can enforce within 12 years (Art 132) But he is also entitled under the provisions of sec 69 of the Contract Act to be reimbursed the money by the mortgagor and can sue to recover it from the mortgagor personally within three years of the date of his payment under this Article—*Shib Lal v Munni Lal* 44 All 67

366 Involuntary payment—It is immaterial whether the party seeking contribution made the payment *voluntarily* or *involuntarily* : *e* whether he made the payment of his own accord and averted any coercive process or whether the amount was realised by seizure and sale of his property under legal process—*per* Bhashyam Aiyangar J in *Rajah of Viana nagram v Rajah Setrucker's* 26 Mad 636 (F B) at p 693 The word paid in Articles 61 and 99 includes payments made or derived out of the sale proceeds or income of the property of the person seeking contribution just as under sec 70 the receipt by a mortgagee of the produce of land mortgaged to him is a payment made to him by the debtor for the purposes of that section—*Ibid* (at p 694) This is also the view of the Calcutta High Court in *Gopinath v Chandra Nath* 26 C W N 340 But in an earlier Calcutta case it was held that where money was realised by coercive process : *e* by sale of plaintiff's property a suit for contribution fell under Art 120—*Kumar Nath v Nobo Kumar* 26 Cal 241

367 Starting point of limitation—The cause of action for a suit under this Article arises when the money is *actually paid* : *e* when the plaintiff is actually out of pocket—*Torab Ali v Nilrutton* 13 Cal 155 Thus where money which was deposited with the plaintiff by T in the name of and to the credit of one A was withdrawn by T in May 1873 and the plaintiff was subsequently sued by A and had to pay the decretal money into Court in January 1883 *held* that the period of limitation for a suit by the plaintiff against T and A to recover the sum so paid into Court began to run from the date of such payment : *e* January 1883 and not when the money was withdrawn from him by the depositor (May 1873)—*Ibid*

Where two persons being under a joint liability to pay a sum of money to a third both made payments but one of them paid more than what was legally due for his share and brought a suit for contribution the suit was governed by this Article and limitation ran from the date of the last

payment made by the plaintiff and any later payment made by the defendant towards the joint liability would not enure for the benefit of the plaintiff or save limitation—*Marudai v Chinnakannu* 1919 M W N 429

Where the payment is involuntary e g where the plaintiff's property is attached and sold and the sale proceeds paid over to the decree holder time will begin to run from the date when the sale proceeds were drawn by the decree holder from Court and not from the date of the sale of the property of the plaintiff—*Pattabhisayya v Ramayya* 20 Mad 73 (following *Faktoruldeen v Mahima Chunder* 4 Cal 52)

62 —For money payable by the defendant to the plaintiff for money received by the defen- dant for the plain- tiff's use	Three years	When the money is received
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368 The language of this Article is borrowed from the form of count formerly in vogue in England under the Common Law Procedure Act, 1852. This count was applicable where a defendant received money which in justice and equity belonged to the plaintiff under circumstances which rendered the receipt by the defendant to the use of the plaintiff. It was a form of suit which was adopted when the plaintiff's money had been wrongfully obtained by the defendant as for example when money was exacted by extortion or oppression or by a abuse of legal process or when overcharges were paid to a carrier to induce him to carry goods or when money was paid by the plaintiff in discharge of a demand illegally made under colour of an office. It was a form of claim which was applicable when the plaintiff's money had been wrongfully obtained by the defendant and the plaintiff in adopting it waived the wrong and claimed the money as money received for his use—*Ra putana Malwa Railway Stores v Ajmere Municipal Board* 32 All 491 (at p 496). See *Moses v Macfarlane* 2 Burr 1005 (1010) *Morgan v Palmer* (1824) 2 B & C 729 26 R R 537 *Neate v Harding* (1851) 6 Ex 349 86 R R 328 *Biman Chandra v Promotha* 49 Cal 886 (889) 36 C L J 295

In an action for money had and received there must be privity of a legal recognizable nature between the plaintiff and the defendant—*Ramasami v Muthusami* 41 Mad 923. This Article applies if there exists such privity between the plaintiff and the defendant so that the defendant may be said to have held the money in trust for the plaintiff—*Nihal Singh v Secretary Gurudwara* 92 Ind Cas 731 A I R 1926 Lah 228

369 Scope —This Article would apply where the money was received by the defendant for the plaintiff himself if the receipt had been for some

body else whose shoes the plaintiff had stepped into this Article would not apply—*Chand v Angan* 13 All 368

It was held in an Allahabad case that this Article would only apply where the amount was received for the plaintiff's use by the defendant himself if the amount had been received by the predecessor of the defendant this Article would not apply. Therefore a suit by the client against the pleader's legal representative for money which had been received by the deceased pleader from Court on behalf of the plaintiff was held to be governed by Art 120 and not by this Article—*Bindraban v Jamuna* 25 All 55. But in this case the learned Judges have taken no account of the definition of defendant given in sec 2 which includes the defendant's legal representatives. In a recent Calcutta case it has been rightly held that a suit by the plaintiff against the pleader's son and legal representative for recovery of a sum of money received by the pleader out of Court for the use of the plaintiff is governed by this Article and not by Article 120—*Rauhari v Rohini Kanta* 35 C L J 330 A I R 1922 Cal 499. The same view has been taken by the Patna High Court in *Rameshwar v Navendri* 5 P L T 355 71 Ind Cas 916 A I R 1923 Pat 259 (following 35 C L J 330). But where the suit against the legal representative involves taking of accounts and is not a suit for a specific sum of money Article 62 cannot apply. See *Rao Girraj Singh v Raghubir* 31 All 429 *Fatima v Imtiaz* 1 P R 1912.

Plaintiff entrusted certain goods to the defendant's brother who however appropriated the goods to his own use and after his death the defendant also sold the goods and held the proceeds as agent of the widow of the deceased. Plaintiff thereupon sued to recover the money from the defendant. Held that this Article did not apply for when the defendant sold the goods he received the money not for the use of the plaintiff but for the use of the widow of his deceased brother. The suit fell under Article 120—*Gurudas v Ram Narain* 10 Cal 860 864 (P C).

370 Received.—This Article only applies to cases where a definite sum of money has been received by the defendant and which the law says he must hold for the use of the plaintiff it does not govern cases where the suit is really one for account and it is sought to recover from the defendant not only the money which he actually received but also moneys which he ought to have received but failed to receive for his default—*Subba Rao v Rama Rao* 40 Mad 291 (293). Such a suit is governed by Article 120.

It is not necessary to prove that the defendant intended to receive the money for the use of the plaintiff whether he intended to receive the money on behalf of the plaintiff or he intended to appropriate it to his own use this Article applies all the same if the money actually belongs to the plaintiff—*Durga Devi v Ram Nath* 85 P R 1919 *Lachmi v Dhanukdhari* 17 Ind Cas 351 (352) *Harthar v Syed Mohamed* 1 P L J 374.

This Article would apply to a suit brought by the plaintiff to recover from the defendant the money received by the latter to the plaintiff's use, even though at the time when the defendant realised the money a suit by the plaintiff to recover the money from the person originally liable would have been barred by limitation—*Mahabir Prasad v Parsandi*, 45 All 410 21 A L J 345 74 Ind Cas 939 A I R 1923 All 532

371 Surplus sale proceeds —A suit for recovery of surplus proceeds of a sale held for arrears of revenue wrongfully taken away by the defendant comes under this Article—*Hanhar v Syed Mohamed*, 1 P. L. J. 374, *Bhagwan v Karam Husain* 33 All 708 (F B) at p 726

Similarly, this Article governs a suit to recover the surplus proceeds of a sale of a patni tenure held for arrears of rent, which were wrongfully withdrawn from Court by the defendant—*Niranka v. Atul Krishna*, 28 C W N 1009 A I R 1925 Cal 67

Just after the purchase of the mortgaged property by the mortgagee, the property was sold for arrears of Government revenue, after payment of the arrears a surplus was left with the Collector, who paid it to the defendant, the previous owner, a suit by the mortgagee to recover the surplus sale proceeds from the defendant was governed by this Article—*Lakshmi v Dhanukdhari*, 17 Ind Cas 351 (Cal).

But the surplus proceeds of a revenue sale remaining in the hands of the Collector under the statutory provisions of sec 31 of Act XI of 1859, are not money had and received for the use of the proprietor of the estate, and a suit to recover the proceeds from the Collector is governed by Article 120 and not by this Article—*Secretary of State v Guru Prashad*, 20 Cal 51 F B (overruling *Secretary of State v Fazal Ali*, 18 Cal 234)

372 Suit to recover share of family property —At the separation of the members of a joint family, the unrealised debts as well as other properties of the family were left undivided. The debts and the rents of the properties were subsequently realised by one or some members of the separated family. In a suit brought by the other members for their shares in the moneys so realised, it was held that this Article applied and time ran from the date of the realisation of the moneys—*Banoo Tewari v Dhoona Tewari* 24 Cal 309, *Ramalagu v Solari*, 41 M L J 274, 69 Ind Cas 274, *Arunachala v Ramasamy*, 6 Mad 402, *Vaidyanatha v. Ayasamy* 32 Mad 191. But it has been recently held by a Full Bench of the Madras High Court, following the English law in *Thomas v Thomas*, (1850) 5 Ex 28, that Article 62 is inapplicable to the case, for one tenant-in-common cannot maintain an action for money had and received against his co-tenant, but can only bring a suit for account, and the only Article applicable would be Art 120, unless an agency can be presumed in which case Article 89 will apply—*Yerukola v Yerukola*, 45 Mad 648 (F. B.), 42 M L J 507, A I R 1921 Mad 150 (following *Subba Rao v Rama Rao*, 40 Mad 291)

But if on partition of the joint family property a portion of the family property is left joint in the hands of one or some members by a family arrangement, the member or members in whose possession it is left will be agents of the other members. A suit by the other members for an account of such property (moveable) and for recovery of their shares is governed by Article 89 and not by Article 62 or 120. Limitation begins to run from the date when an account is demanded and refused, or if no demand is made when the agency is terminated—*Gabu Naroba v Zipru Ramsingh* 45 Bom 313, *Yerukola v Yerukola*, 45 Mad 648 (663), 42 M L J 507. 71 Ind Cas 177

Where after separation of a family, two of its members held a bond jointly, a suit by one of them for his share of money recovered by the other on such bond was governed by Art 62, and not by Art 127 because the family was no longer joint—*Thakur v Partab* 6 All 442, *Gajraj v Sadho* 15 O C 397

Where a debt due to two brothers jointly was realised before partition by one brother, who afterwards fraudulently represented to the other brother's representative at the time of partition that the debt was still outstanding, a suit by the latter to recover his share of the money was governed by this Article and limitation would run according to section 18 from the time when the plaintiff was aware of the fraud—*Lakshmi narasamma v Lakshamma*, 25 M L J 531

373 Suit against ex-agent —A suit by the plaintiff against his ex agent for money realised by the latter after the termination of the agency falls under this Article—*Hansraj v Ratni*, 13 A L J 494

The plaintiffs were the proprietors of a brick making business which had a branch at Muttra where the defendant was employed as their agent. The defendant, however, in course of time started a brick making business of his own at Brindaban, close to Muttra, so that all orders for bricks arriving at the plaintiffs' branch firm at Muttra were forwarded to and executed by the defendant's own firm at Brindaban. In consequence of this the plaintiffs dispensed with the services of the defendant in 1913, and in 1916, more than three years after the dismissal, brought a suit against him to recover the profits made by the defendant from his brick business. It was held that it was the duty of the defendant as agent not merely to do nothing to injure the interests of the plaintiffs' firm, but to do all in his power to further them, and therefore not to place himself in a position adverse to the interests of his principal, and the profits which he made in his own firm out of the plaintiffs' branch firm in the manner mentioned above, and which he was bound in his capacity as agent to pay over to his employers, must be regarded as money had and received for the use of the principal. In this view of the case Art 62 applies, but the suit being brought more than three years from the date when the monies were received, was time-barred. As this cause of action arises out of mixed consideration the suit may come

within Art 90 but even applying that Article the suit is also barred as the plaintiffs had knowledge of the defendant's misconduct more than three years before suit—*Puran Mai v Ford* 41 All 635

374 Suit for refund of consideration money—Where the consideration failed *ab initio* the transaction being in its inception void the suit is governed by this Article and not by Article 97 which deals with suits for refund of money paid upon an existing consideration which afterwards fails—*Buta Ram v Gurdas* 44 P R 1918 *Ardeshir v Vajesingh* 25 Bom 593 *Basuti Reddi v Tallapragada* 35 Mad 39 *Westropp v Solomon* 1 D & L 122 *Hunt v Silk* 5 East 449 *Blackburn v Smith* 2 Ex 783 Thus a contract of sale negotiated by a minor (the minor having settled the terms paid consideration and received the sale deed) is void *ab initio* A suit for refund of the consideration money is governed by Art 62 and not by Art 97—*Munni Lal v Madan Gopal* 13 A L J 185

When there is a total failure of consideration with regard to a lease a suit for refund of the consideration money is governed by this Article and not by Art 97—*Biswanath v Surendra* 19 C W N 102

Where the mortgage being void the consideration failed *ab initio* a suit by the mortgagee to claim repayment of money advanced to the mortgagor is a suit for money had and received and is governed not by Art 97 but by this Article—*Bai Diwali v Umedbhai* 40 Bom 614 *Javerbhai v Gordhan* 39 Bom 358

Similarly a suit by a lessee for a refund of part of the premium paid for a lease proportional to the portion of the land of which possession could not be obtained by him it having been previously leased out by the lessor to another is governed by this Article and not by Article 97 because the consideration failed *ab initio* in regard to that portion of the land—*Mahomed Ayub v Elahi Bakhsh* 49 Ind Cas 258 (Cal)

But where the sale was valid at its date and the purchaser took possession but subsequently a judgment creditor of the vendor sought to execute his decree against the lands and ultimately ejected the purchaser, a suit by the purchaser to recover the purchase money is governed by Article 97 and not by this Article because the sale being valid at its date the consideration did not fail *ab initio* but it subsequently failed by reason of dispossession—*Venkatanarasimhudu v Peramma* 18 Mad 173 Where a sale by a member of a joint Hindu family governed by the Mitthala law went off on objection being taken by the other co sharers when the purchaser attempted to take possession the sale was voidable and not void and a suit by the purchaser for recovery of money paid by him is governed by Article 97 (not by this Article) because there was an existing consideration which subsequently failed by reason of the purchaser not getting possession—*Hanuman v Hanuman* 19 Cal 123 (P C) A suit by the purchaser to recover a portion of the purchase money on account of the vendor's failure to give possession of a portion of the lands sold by reason

the vendor's not having any title to that portion, is governed by Article 97 and not by this Article, the sale being voidable only and not void—*Tulsiram v Murlidhar*, 26 Bom 750 Where the vendor sold the property in good faith believing it to be his own, and the vendee obtained possession but was subsequently ousted by the true owner, it was held that although the sale was void *ab initio*, still as there was good faith on the part of the vendor there was good consideration so long as the vendee remained in possession A suit for refund of the purchase money is governed by Article 97 and not by this Article—*Narsing v Pachu*, 37 Bom 538

Where a *pains taluq* was sold for arrears of rent, but the sale was reversed on 24th August 1905 by reason of the Zemindar's (who brought the taluq to sale) not having the right to make the sale, and the decree reversing the sale was affirmed on appeal on 3rd August 1906, a suit brought by the purchaser in September 1908 against the Zemindar to recover so much of the purchase money as the latter had received, is really a suit for money had and received by the defendant to the plaintiff's use, within the meaning of Art 62 and not a suit under Article 97, because the Zemindar not having the right to bring the taluq to sale, the sale was void *ab initio* and there was no "existing consideration" for it The suit was time barred, as time ran from the date of the sale Even assuming (but not holding it to be correct) that the suit was one under Article 97, time ran from August 1905 and the suit was likewise barred—*Juscurn Boid v Prithi Chand*, 46 Cal 670 (P C)

375. Suit by one heir for money received by another —The plaintiff claimed as an heir to N deceased a moiety of monies which at the time of N's death were deposited with a banker and which the defendant, the other heir of N, had wholly received from such banker, the suit was governed by this Article—*Kundun v Bans*, 3 All 170

A suit by persons entitled to a portion of the money left by the deceased against the holder of a succession certificate who has received the whole amount is governed by this Article—*Najmunnessa v Amina* 38 All 188, *Amina v Najmunnessa* 37 All 233, 13 A L J 255, 27 Ind Cas 712 Where one of two brothers obtained a succession certificate in respect of certain debt due to their deceased uncle, and realised some money on the strength of the certificate, a suit brought by the widow of the other brother, who died after the certificate was obtained for an account of all sums received by the defendant as holder of the certificate and for recovery of her husband's share, would fall under this Article—*Abdul Ghaffar v Nurjahan Begum*, 37 All 434, *Ahidannissa v Isuf Ali*, 50 Cal 610, 27 C. W N. 941, 74 Ind Cas 1010

376 Assignment of debt —Where the plaintiff assigned a mortgage-debt to the defendant, and the latter under colour of the assignment received moneys from the mortgagor, but the assignment was subsequently declared void, a suit by the plaintiff to recover from the defendant the

amount received by the latter from the mortgagor fell under this Article—*Shanmuga v Govindasami* 30 Mad 459

Where a mortgagee assigned the mortgage for consideration and afterwards received the mortgage money from the mortgagor, a suit by the assignee to recover the money from the assignor (mortgagee) fell under this Article—*Sriramulu v Chenna* 23 Mad 396 See the same case cited under Art 97

Certain G P Notes standing in the name of A were assigned to B, and were afterwards attached in execution of a decree obtained by A's creditors against A B after vainly objecting to the attachment brought a suit against A and the decreeholders, to establish his right to the Notes, and was successful in that suit While it was pending, A realised interest on the Notes In a suit by B to recover the interest so realised, held that this Article applied—*Chand Mal v Sansar Chand*, 36 P R 1913

377 Compensation money —A suit against the tenant by the landlord to recover his share of compensation money awarded by Government and withdrawn by the tenant who falsely represented himself to be the real owner falls under Art 62 or Art 120—*Khetler v Dinendra* 3 C W N 202 But where at the time when the defendant (lessee) drew out the compensation money, the plaintiff had not yet established his title to the property acquired by Government but did it subsequently, the money when taken out by the defendant could not be said to have been received for the plaintiff's use and consequently a suit by the plaintiff to recover the money from the defendant after he established his title to it does not fall under this Article but under Article 120—*Nund Lal v Meer Aboo*, 5 Cal 397, *Krishnan v Perachan*, 15 Mad 382

378 Other suits —A suit by the plaintiff for recovery of money received by the defendant, his co mortgagee in satisfaction of a mortgage in which both were interested, though the deed stood in the name of the defendant alone is a suit governed by this Article—*Mahomed Wahib v Mahomed Ameer*, 32 Cal 527

Money deposited by the plaintiff with the defendant as part security for the due performance of the terms of a lease in case it should be granted to the plaintiff, may be recovered from the defendant as money received to the use of the plaintiff, when negotiations for the lease subsequently fall through—*Johury v Thakur Nath*, 5 Cal 830.

A batwarra ameen employed by the Collector drew from the public treasury a sum of money to pay the establishment, but failed to pay the plaintiff who was a mohurrar under him In a suit against the ameen by the plaintiff for recovery of his salary, it was held that the plaintiff's claim was for money had and received on his account—*Obhoy Gharan v Hur Chandra*, 13 W R 150

A suit for money received by the pleader of the plaintiff out of Co

for their use is governed by this Article—*Ramhari v Rohini* 35 C L J 330 A I R 1922 Cal 499

A suit to recover money paid by the plaintiff to the defendant by mistake in excess of the amount legally due is governed by Article 90 which specially provides for the case rather than Article 62—*Tofa Lal v Moynuddin* 4 Pat 148 A I R 1925 Pat 765

A suit for the recovery of money fraudulently obtained by the defendant in collusion with a third party is a suit for money received by the defendant for the plaintiff's use and governed by this Article—*Raghumani v Nilmoni Dey* 2 Cal 393

A suit for recovery of rent received by a joint lessor falls under this Article—*Gopal Rao v Ambabai* 16 N L R 183

A suit by the real claimant against a benamidar in whose name a bond stood and who had realised the money due upon it is governed by this Article—*Sundar v Fakir* 25 All 67 *Subbanna v Kunhanna* 30 Mad 298 *Narayanna v Rangasami* 1915 M W N 215

An attaching creditor is not entitled to the sale proceeds as against the holder of a decree charging the lands attached on the ground of the priority of his attachment if the charge had been created prior to the attachment. Where in such a case the Court had wrongly ordered the holder of the decree charging the lands to refund to the attaching creditor the sale proceeds paid to him and he brought a suit to recover the money by the establishment of his prior right to the same and to cancel the order of the Court compelling him to refund the money as it was made without jurisdiction held (by the majority of the Full Bench) that the suit fell under this Article (but the other two Judges were of opinion that Art 120 applied)—*Ram Kishen v Bhavani* 1 All 333 (F B). It is very doubtful whether the decision of the majority of the Full Bench in this case is correct as the money in this case was paid under an order of a Court which was still in existence at the time of the suit—*Stirling* 5th Edn, p 255

Money paid under a void authority or under a void judgment to a person not entitled to receive it can be recovered from him by the rightful owner in an action for money had and received—*Ram Narain v Brij Banke* 39 All 322 (331)

Where in execution of a decree a certain debt is attached and the amount of the debt is paid by debtor into Court and received by the decree holder a suit by the claimant of the debt against the decree holder is governed by Art 62 or 120—*Yellammal v Ayyappa* 38 Mad 978. In execution of a decree against A certain money due to A was attached. Before that date A had transferred his property to B and the money was legally due to B. The debtor of A paid the money to the bailiff who deposited it into Court and it was paid to A's decree holder. Subsequently B brought a suit for the recovery of the money within three years of the date when it was paid. Held that this Article governed the suit and not

Art 20 since the suit was one for money had and received for the plaintiff's use—*Naidar v Ganga* 38 All 6-6

A decree held by the plaintiff was sold in execution of a decree against him. The auction purchaser realised the amount of the decree he purchased but subsequently the sale was set aside. The plaintiff sued the auction purchaser for the recovery of the money realised by him under the decree. *held* that the suit was not one for damages but was one for money payable by the defendant for money received by the defendant to the plaintiff's use and fell under this Article—*Bhawani v Rikhi Ram* 2 All 354

Where a mortgaged property was sold for arrears of revenue and the surplus sale proceeds were withdrawn by the mortgagor from the Collectorate a suit by the mortgagee to recover his mortgage money out of the sale proceeds is governed by Article 132 or 130 but not by Article 62 or 97—*Ramala Kanta v Abdul Barkat* 27 Cal 180

A suit to recover the excess in the contribution paid by the holders of a part of a *shelsandi watan* towards the annual emoluments of the office holder is governed by this Article—*Ladji v Musabi* 10 Bom 665

A suit by one sharer in a *watan* against another sharer or alleged sharer who has improperly received the plaintiff's share of the *hak*, is a suit for money received by the defendant for the plaintiff's use and is governed by this Article—*Harmukhgaon v Harisukh* 7 Bom 191

The limitation of three years under this Article and not that of 12 years under Art 132 is applicable to a claim by one co sharer against another for an *amin sukhi* allowance attached to a hereditary office which the defendant had received from the Government treasury—*Desai Maneklal v Desai Shibilal* 8 Bom 426

Where a person (a co sharer in a *deshpande watan*) having previously obtained a decree declaratory of his title as against his co sharers sues to recover arrears from them the suit is one for money had and received by the defendants for the plaintiff's use—*Du'abb v Baushidhar* 9 Bom 111. Where the right of the mamdar to the yearly payment of the money value of fixed quantities of grain payable by his *khori* (the defendant), was settled by a decision in a previous suit between them and the inamdar now sued to recover arrears of such dues for 10 years, *held* that this Article applied and only three years arrears were recoverable—*Morbi'at v Gangadhar* 8 Bom 234

A suit by the plaintiff to recover his share of a Government allowance received by the defendant is subject to the limitation of three years under this Article—*Chamanlal v Bapubhai* 22 Bom 669. *Raoji v Bala*, 15 Bom 135

Where a Municipal Board has assessed taxes on plaintiff's goods at a higher rate than that sanctioned by the Government a suit for refund of the amount realised over and above the sanctioned rate would fall

this Article—*Rajputana Malwa Railway Stores v Ajmere Municipal Board*, 32 All 491

Where the price of a consignment of goods was paid by the plaintiff in advance on 15th November, but when the goods were delivered on 22nd November, certain of the goods were found missing and then the plaintiff sued for recovery of the sum overpaid, held that limitation ran from the failure of consideration i. e., 22nd November when the short-delivery took place and not from 15th November, the date when defendant received the money—*Atul Kristo v Lyon*, 14 Cal 457 (460) But it is curious that in this case the Judges held that Art 62 was applicable while they computed the period of limitation from the date of "failure of consideration" using the language of Article 97

A suit to recover money under section 73 (2) C P Code, on the ground that the plaintiff and not the defendant was entitled to receive the same in proceedings in execution of a decree for rateable distribution, is governed by Art 62, and not by Art 120, the cause of action arising on the date of the wrongful payment to the defendant—*Balnath v Ramadoss*, 30 Mad 62; *Vishnu v Achut*, 15 Bom 438

A suit by one co sharer for partition of the family property as well as to recover his share of a certain sum received by another co-sharer or manager, is governed by Art 120, if the suit was to recover the money only, this Article would have applied—*Parsotam v Radha*, 37 All 318

Disputes having arisen between the heirs of one G, deceased, the defendant was appointed to sell his stock in trade and pay up the creditors pending certain arbitration proceedings. The defendant sold certain property and paid up certain debts. The arbitration proceedings fell through. In a suit brought by G's sister for recovery of her share, held that this Article applied—*Masikhuddin v Imtiyazunissa* 37 All 40

On a dispute between owners of contiguous properties, some lands were attached under section 146 of the Criminal Procedure Code and the income was deposited in the collectorate. Thereupon several suits were instituted by the defendant (one of the owners) for the establishment of his right and the dispute was then compromised. In the meantime, the defendant withdrew a portion of the money alleging that it represented his share of the profits whereupon the other owner sued him for the recovery of that money on the ground that the lands attached belonged to him. Held that the suit was not governed by Article 62. The defendant when he withdrew the money from the collectorate took the money as owner, and had good reason for believing at the time that the money was really his, it could not therefore be said by any process of reasoning that the defendant received the money for the use of the plaintiff. The suit fell under Article 120—*Anandram v Hem Chandra*, 50 Cal 475, 72 Ind Cas 1017, A I R 1923 Cal 379

A debt due to K from B was attached before judgment in a suit brought

by V K was thereafter adjudged an insolvent. The attached debt was paid into Court and the Official Receiver of K's estate claimed the money and applied to the Court for the payment of the money to him and not to V by virtue of sec 34 of the Prov Ins Act (1907). The application was dismissed and the amount was paid to V. The Official Receiver then filed a suit to recover the money from V. Held that this Article applied and not Article 11—*Official Receiver v Iyeraraghavan* 45 Mad 70 (see this case cited under Article 11).

63—For money payable for interest upon mo ney due from the de fendant to the plain tiff	Three year	When the interest be comes due
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379 A suit by a depositor against a banker for the difference between the higher rate of interest claimed by him and the lower rate paid by the banker is a suit governed by this Article—*Mahundi v Balabishan* 3 All 328

This Article applies where the interest is actually payable. If in a *thaana* transaction money is deposited with the understanding that at the end of each *thavanas* period the interest for that period is *not to be paid* but is to be added to the principal and both are to be treated as a fresh deposit a suit to recover principal and interest is governed by Article 60. The claim as to interest will not be treated as falling under Article 63—*Narayanan v Suppia Chetty* 43 Mad 69

Where a mortgagee not being entitled to claim *post diem* interest as such under the mortgage claims such interest by way of damages for the non payment of mortgage money such a claim is governed by Article 116 of the Limitation Act—*Mathura v Narindar* 19 All 39 (P C). See also *Gudri v Bhubaneswari* 19 Cal 19 and *Mati v Ramhari* 24 Cal 699 (F B) cited under Art 116

64—For money payable to the plaintiff for money found to be due from the defen dant to the plaintiff on accounts stated between them	Three years	When the accounts are stated in writing signed by the defen dant or his agent duly authorised in this be half unless where the debt is, by a simul taneous agreement writing signed as
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said, made payable at a future time, and then when that time arrives.

380 Account stated —An account is said to be stated only when there have been *reciprocal* demands between the parties and the balance struck then becomes the consideration for the discharge on either side [Such an account stated amounts to a new contract and is a substantive cause of action—*Ishar Das v Harkishan*, 1916 P W R 148]

A mere statement of the balance which is due on a particular date cannot be called an account stated within this Article. An account stated is a transaction in which several cross items are set off one against the other and the balance is struck in favour of one of the parties. In such a case, the law implies a new promise by the other party to pay the balance in consideration not merely of past debts but also of the extinguishment of the old debts on each side, and hence it is not necessary that the balance should be struck within the period of limitation applicable to any of the items in the account—*Suraj v Bourke*, 5 P L J 371, *Hargopal v Abdul*, 9 B H C R 429

The bare striking of a balance consisting largely of barred debts in the defendant's account book in the plaintiff's handwriting which is not signed by the defendant and which does not contain words acknowledging liability by the defendant or stating account on his behalf is neither an acknowledgment under sec 19 nor an account stated under Art 64, nor a promise under sec 25 (3) of the Contract Act—*Gulsari Mal v Kishan Chand*, 137 P R 1907

Where the defendant after having examined the accounts acknowledged the balance due by him and signed the entry of the same in the plaintiff's account book, it was held that the acknowledgment, being a mere acknowledgment of a balance struck, was neither an account stated to which Art 64 applied, nor an evidence of a new contract which could be the basis of a suit—*Ganga v Ram Dayal*, 23 All 502

In an account stated it is necessary that there should have been *reciprocal* demands between the parties. Therefore when a sum of money was deposited with the defendant's firm, and long after a suit for the money was barred by limitation, a balance was struck calculating the amount of interest and principal and was signed by the defendant acknowledging the same to be "due for balance of old account" it was held that the transaction did not amount to an account stated as there was no *reciprocal* demand, but was only an acknowledgment which, as the suit had then long been barred by limitation was of no avail—*Nahanibai v Nathu*, 7 Bom 414. In *Manjunatha v Devamma* 26 Mad 186, however it was remarked that there need not be *reciprocal* demands between the parties

in order to bring an account stated within this Article. But this remark must be treated as an *obiter* as the judgment shows that there were in fact *reciprocal* demands in that case.

A *khat* consisting of one item on one side only and bearing the mark of the debtor is merely an acknowledgment and not an account stated—*Tribhovan v. Amin* 9 Bom 516. The striking of a balance in an account, the items of which are all on one side does not amount to an account stated—*Jamun v. Nand Lal* 15 All 1.

Where in consequence of default in the payment of rent, an adjustment of account was entered into between the landlord and the tenant, and a balance found to be due from the tenant, it was held that an action to recover such balance with interest was not a suit for arrears of rent, but one for the recovery of money on account stated governed by the provisions of this Article—*Dolee v. Goor*, 24 W R 218.

Where money is placed on deposit with another person, who after some time submits accounts showing a credit balance in hand, the transaction is really a deposit (Art. 60) and the statement of accounts will not alter its nature and bring the case under the present Article—*Lazarus v. Krishn Chunder*, 28 Cal 393.

The plaintiff and the defendant were partners in a business which terminated in the year 1913, and on the closure of the partnership on the 24th April 1913 the parties examined the accounts; as a result of that scrutiny the defendant admitted in writing in the plaintiff's book a debt balance of Rs 4017. The entry in the plaintiff's *bahi* which was signed by the defendant, ran as follows:—"After the scrutiny of the accounts of this firm I have struck a debit balance against me of Rs 4017 on account of losses and advances of every kind." On the 16th February 1918 the plaintiff sued the defendant for recovery of the sum on the basis of the entry. Held that the entry being an account stated between the parties, the suit was governed by Article 64 and not by Art. 106—*Nand Lal v. Parlab Singh*, 3 Lah 326, A I R 1922 Lah 425, 69 Ind Cas 502.

Where accounts have been taken from the agent and adjusted and a specific sum has been found due from the agent to the principal, the latter becomes entitled to sue forthwith for recovery of that money. A suit to recover the money is governed by Article 64 as 113, and not by Article 89 because that Article refers to a suit in which accounts *have to be taken* and not a suit where an account *has been rendered*—*Kesho Prasad v. Sarwan Mal*, 25 C L J 335.

38r. "Signed"—This Article does not apply unless the account stated is in writing and signed by the defendant—*Dukhi v. Mahomed*, 10 Cal 284 F B (overruling *Shaiikh Akbar v. Shaiikh Khan*, 7 Cal. 256); *Murugappa v. Vyaburi*, 32 M L J 536; *Thakuria v. Sheo Singh*, 2 All 872, *Zulfiyar Hussain v. Munna Lal*, 3 All 148 (F. B.).

65—For compensation for breach of a promise to do anything at a specified time or upon the happening of a specified contingency.	Three years	When the time specified arrives or the contingency happens.
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382 A verbally became surety upon a bond executed by B for repayment in May 1872 to the plaintiff, of certain advances promising if B does not pay eventually (*shesh porjanto*) I will ' Default was made, and in April 1878 the plaintiff filed a suit against both B and A, which was clearly barred against B It was held that the words '*shesh porjanto*' could not be taken as limited to the time specified in the bond, and that the lower Court, in order to determine whether the suit was barred against A, must find upon the evidence when a demand was made upon him for payment, and then apply this Article—*Bishumbar v Hungsheshur*, 4 C L R 34

In case of a promissory note payable on demand the cause of action against the surety arises on the same date on which it arises against the principal debtor, viz the date of the prom note The surety is not entitled to any further notice—*Brojendra Kishore v Hindusthan Co operative Insurance Society*, 44 Cal 978. *Raja Sreenath v Raja Peary Mohan*, 21 C W N 470

Where a bond executed by the defendants contained a covenant that money would be paid either on a certain date or in the event of default, on the date when a certain mortgage (executed by the defendants in favour of the plaintiff) would be redeemed it was held that the cause of action for a suit to recover money due under the bond arose when the mortgage was redeemed without satisfying the bond—*Mahabir v Durbiyar*, 8 A L J 233

Where there was an agreement by the vendor to refund purchase-money in case of land proving deficient, and the land actually proved deficient, a suit for refund of the purchase money was a suit governed by this Article, if the sale deed was registered, by Art 116—*Kishen v Kinlock*, 3 All 712 The defendants sold by registered sale deed their shares in certain land to the plaintiff and had agreed that if the land sold should not fall to their share in the partition proceedings which were then pending, they would pay compensation The vendors were allotted at partition a less area than the area sold to the plaintiff, and compensation was claimed accordingly Held that the suit fell under this Article read with Article 116, and time ran from the date of the order of the Revenue

Officer passed in the partition proceedings—*Rukan Din v Hassan Din* 72 Ind Cas 89 A I R 1923 Lah 23

A suit by the mortgagor against the mortgagee to recover the balance of the consideration payable by the latter to the former together with damages for nonpayment of the amount in time is a suit governed by Article 65 read with Article 116 (the mortgage being registered)—*Nauha v Irdar* 13 All 100 (1904)

When grain is advanced to the defendant on a contract that it should be repaid in kind a suit against the defendant for compensation for not having fulfilled the promise falls under Article 65 or 115 but not under Art 52 or 10 Article 52 refers only to those cases in which the contract is to pay for the price of the goods in money and not in kind—*Mad Din v Sohan Singh* 4 Lah L J 268 65 Ind Cas 691 A I R 1922 Lah 271 *Mengka Ram v Hattu* 41 P R 1918 *Labb Singh v Rur Chand* 4 Lah L J 64 A I R 1922 Lah 122

Where the promisor before the arrival of the specified time intimates his intention or not performing his promise still limitation will not commence to run until the specified time arrives—*Mansut Das v Rangayya* 1 M H C R 162

66—On a single bond Three The day so specified
where a day is specified years
fied for payment

383 Single bond — A bond merely for the payment of a certain sum of money without any condition in or annexed to it is called a simple or single bond The term single bond is sometimes used to signify a bond given by an obligor as distinguished from one given by two or more — Halsbury's Laws of England Vol III p 80 In *Nihal Chand v Khuda Baksh* 76 Ind Cas 150 A I R 1921 Lah 534 a bond executed by two persons (*vis* principal debtor and surety) was held to be a single bond under this Article The expression single bond means a bill or written engagement for the payment of money without alternative condition or a penalty attached—*Lachman v Kesri* 4 All 3 *Gurdatta Mal v Pal Singh* 26 P R 1892 *Harilal v Thamman* 26 O C 121

Where in a debt bond the debtor stipulated that if the principal and interest be not paid up at the specified period the creditor would be at liberty to recover the amount by instituting a suit from any moveable and immoveable property in my own mulk it was held that the language was too vague to warrant the inference of the creation of a mortgage and that the instrument was no more than a simple bond to which Art 66 applied if such instrument was registered Art 116 would apply—*Collector v Bets* 14 All 162

The liability of the surety being co-extensive with the liability of the principal a suit on a bond executed by the principal debtor and

against both of them falls under this Article, and limitation runs as regards both from the date fixed for payment—*Nihal Chand v Khuda Baksh* (supra).

384 Specified date —Where the bond stipulated for payment *within two years* or on certain contingencies, the case was not one under this Article as no particular day was specified for payment—*Gauri v Surju*, 3 All 276.

But in *Narain v Gouri Pershad* 5 Cal 21, where a bond provided that the principal should become due within a certain specified time, e.g. within 6 months from the date of execution, it was held that the last day of the six months from the date of execution of the bond was to be regarded as the 'day specified' under this Article, and a suit brought within 3 years from that day was not barred. The same view has been taken in *Ball v Stowell* 2 All 322 (per Spankie J) *Gaya Prosad v Sher Ali*, 15 A L J 313 *Sham Lal v Tehariya* 18 A L J 476

But where under a bond power is given to the creditor to demand the whole of the money due under the bond whenever default is made in payment of the interest for any two years consecutively, it is impossible to predicate of the bond that there is any certain day 'specified' for payment within this Article. The bond falls under Art. 80—*Hori Lal v Thamman Lal* 26 O C 121 9 O L J 416 A I R 1923 Oudh 19

67—On a single bond, Three The date of executing the
where no such day is years. bond.
specified

385 Where a deed provided that if the obligee desired to recover his money he should be at liberty to realise it whenever he wished, it was held that for the purpose of limitation, money became due immediately upon the execution of the bond—*Gairaj v Raghubar*, 18 O C 86

68—On a bond subject Three When the condition is
to a condition years broken

386 A suit against the administrator and his sureties on a bond executed under sec 78 of the Probate and Administration Act is governed by this Article—*Ramanathan v Ranganmal*, 17 M L T 61, 27 Ind Cas 849, *Ahmed v Fatima* 8 Bur L T 59 26 Ind Cas 505 But in *Kanti Chandra v Ali Nabi*, 33 All 414, 8 A L J 199, 9 Ind Cas 935, and *Ko Pu v Ma Thein*, 12 Bur L T 22, 56 Ind Cas 963, the Judges are of opinion that a suit on an administration bond is governed by Article 127

An administration bond is a bond 'subject to a condition' within the meaning of this Article and where the bond contains several conditions, and a suit is brought for breach of one of the conditions, it must be

filed within three years of that breach. The breach of each condition gives rise to a separate cause of action and time begins to run from the date of the particular breach giving rise to the suit—*Maung San v Maung Kyaw* 1 Rang 463 76 Ind Cas 802 A I R 1924 Rang 68. Ordinarily, the administrator's work may be said to be completed when he files his final accounts, showing how he has dealt with the estate and these accounts have been accepted by the Court. Limitation will then begin to run. But it very often happens that there is litigation pending against the administrator and in such a case the administrator (and consequently his sureties) cannot be absolved until the close of the litigation. If a decree is passed against him in that litigation he is bound as administrator to pay money or deliver property as the case may be, and failure in this respect is a breach of the bond. Limitation runs from the date of this breach—*Ibid*. In cases where the administration bond contains successive covenants each breach gives a separate cause of action, but the date of the last breach is the starting point of limitation in a suit on the bond when the bond is conditioned on the performance of several acts, and the obligation to pay is enforceable till the last of the conditions has been fulfilled—*Ramanathan v Rangammal*, (supra).

A bond executed by the guardian under sec 34 of the Guardians and Wards Act, is a bond 'subject to a condition' under this Article, the condition of the bond being that the guardian shall render accounts and shall pay the balance found due by him from time to time—*Krishna Chelliar v Venkata chalapaithi*, 42 Mad 302 (309).

A suit to recover a penalty imposed under section 165 of the Madras Local Boards Act (V of 1894) is governed by this Article—*Kundapur Taluq Board v. Lakshmi Narayana*, 17 M L J 537.

69—On a bill of exchange	Three	When the bill or note
or promissory note	years	falls due
payable at a fixed time		
after date.		

387 M, on the 12th October 1855, drew a bill of exchange, payable three months after date in favour of B, which was accepted by J. Before the bill became due, B endorsed it to P, who again endorsed it for full value to MB and Co. of which firm ML was a partner. MB and Co. discounted the bill with G who presented it at maturity to J, who dishonoured it. G thereupon sued ML and obtained a decree, which ML satisfied. ML thereupon brought the present suit, on the 18th February 1865 against J, as the acceptor of the bill, for the amount he paid under G's decree. It was held that the suit was barred, the plaintiff's cause of action having accrued when the bill became payable and the acceptor refused to pay—*Mohendra v Jadub*, 14 W R O C 5.

70 —On a bill of exchange payable at sight, or after sight, but not at a fixed time	Three years	When the bill is presented
71 —On a bill of exchange accepted payable at a particular place	Three years	When the bill is presented at that place
72 —On a bill of exchange or promissory note payable at a fixed time after sight or after demand	Three years	When the fixed time expires
73 —On a bill of exchange or promissory note payable on demand and not accompanied by any writing restraining or postponing the right to sue	Three years	The date of the bill or note

388 The words on demand have been used in this Article in the sense in which they have been interpreted in English Common Law i.e. at once and without demand—*Secretary of State v Radhika Prasad Bapu's* 46 Mad 259 (288 289)

A promissory note payable at sight is a promissory note payable 'on demand' and is governed by this Article—*Durga Prasad v Kalicharan* 40 C L J 84 A I R 1924 Cal 1065 81 Ind Cas 475

A promissory note payable at any time within six years on demand is not governed by this Article but by Art 120—*Sanjivi v Kama Erappa* 6 Mad 290

389 Postponing right to sue —Where a promissory note was accompanied with a letter in which the debtor stated that he would pay the principal and interest within one year *held* that the letter amounted to a writing postponing the right to sue within one year, and that limitation would not run till at the expiration of the period mentioned in the writing and the suit was governed by Art 80 and not by this Article—*Jwala Prasad v Shama Charan* 42 All 55 Where the defendant executed a promissory note to the plaintiff payable on demand, and on the same date gave a writing to the effect that ten months *shyvanai* (time for payment)

from the date of the pro note has been fixed for this note it was held that the pro note was accompanied with a writing postponing the period of payment consequently Article 73 did not apply but Article 80 and time began to run from the expiry of the period mentioned in the writing—*Annamalai v Velayuda* 39 Mad 129 (F B) overruling *Sitaram v Hanuman Mahomed* 19 Mad 368 and *Somasundaram v Narasimha* 29 Mad 212. A promissory note payable after six months whenever the plaintiff shall demand the same is a promissory note payable on demand with the right to sue restrained for six months and limitation consequently begins to run on the expiry of the six months from its date—*Jeevanmatta v Manekji* 7 B H C R 26

74—On a promissory note or bond payable by instalments	Three years	The expiration of the first term of payment as to the part then payable and for the other parts the expiration of the respective terms of payment
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75—On a promissory note or bond payable by instalments which provides that if default be made in payment of one or more instalments the whole shall be due	Three years	When the default is made unless where the payee or obligee waives the benefit of the provision and then when fresh default is made in respect of which there is no such waiver
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390 Scope.—This article is applicable only to *suits* on bonds and promissory notes payable by instalments and not to *applications* for execution of a decree payable by instalments—*Ugra Nath v Lagonmani* 4 All 83. The applications are governed by Art 182 (7).

This Article does not apply to a suit brought on a verbal contract—*Koylash Chunder v Boykoonta* 3 Cal 619

391 Bond payable by instalments.—A covenant for payment of interest by instalments does not bring a bond under this Article. Thus where by a bond the principal lent was payable within a fixed time but the interest was made payable half yearly held that this was not a bond payable by instalments—*Ball v Stowell* 2 All 322. *Shib Dayal v Mehroban* 45 All 27 (41) 69 Ind Cas 981. *Narain v Gouri Pershad* 5 Cal 21. Even if the bond provides that on default of payment of any instalment of interest the whole amount of principal would be payable at once the

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from the date of the pro note has been fixed for this note it was held that the pro note was accompanied with a writing postponing the period of payment consequently Article 73 did not apply but Article 80 and time began to run from the expiry of the period mentioned in the writing—*Annamalai v Velayuda* 39 Mad 129 (F B) overruling *Simon v Hakim Mahomed* 19 Mad 368 and *Somasundaran v Narasimha* 29 Mad 212. A promissory note payable after six months whenever the plaintiff shall demand the same is a promissory note payable on demand with the right to sue restrained for six months and limitation consequently begins to run on the expiry of the six months from its date—*Jeanneissa v Manekji* 7 B H C R 26

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case would not fall under this Article but under Article 66. Thus, where money lent on a bond was made payable on a certain date, viz 28th May 1874, subject to the payment of interest every month and it was provided that if any monthly payment of interest should remain unpaid it should be lawful for the creditor immediately to call in and demand payment of the principal and interest, it was held that the cause of action accrued on the due date of the bond, i.e. 28th May 1874 and not on the date when the first unpaid instalment of interest became due—*Narain v Gouri Pershad*, 5 Cal 21. But where a bond provided that the obligee should be put in possession of land, and out of the produce thereof pay himself certain sums annually, and the balance to the obligor, and that if the obligee's receipts of produce should in any way be interfered with, the obligor should pay certain sums annually it was held that this was a bond payable by instalments—*Ramchandra v Gokalgiri*, 1877 P J 309.

392 Option to sue for the whole amount.—A distinction should be drawn between a case where the bond provides that on default of payment of one instalment the entire amount shall become due, and a case in which the bond gives the creditor an option to sue for the whole amount if he so chooses. In the former case Article 75 clearly applies and limitation runs from the first default, and the creditor must sue for the whole amount then remaining due. But in the latter case Art 75 is not applicable, because the creditor is not bound to sue for the whole amount on the first default but is at liberty to sue for each instalment as it falls due—*Ajudhia v Kunjal*, 30 All 123. *Mohan Lal v Tika Ram*, 41 All 104. In these cases, the bond gave an option to sue and the debtor made default in payment of several instalments, the creditor brought a suit for the recovery of the unpaid instalments more than three years after the date of the first default, but within three years from the date of default of the payment of the instalments sought to be recovered, and it was held that the suit was not barred. See also *Nilmadhab v. Ramsaday*, 9 Cal 857 and *Asmutulla v. Kally Churn*, 7 Cal 56, where it has been held that in cases where the creditor has a mere right or option to elect to recover the whole amount at once on failure in the payment of an instalment, that does not make it obligatory on the part of the creditor to recover the whole amount at once on failure in the payment of an instalment, but the creditor can exercise his power of election.

The terms of an instalment bond were that on the expiry of the term for payment of half the sum with interest and compound interest the creditor had a right to recover the amount of first instalment with interest, or to recover the entire amount after the expiry of the last term with interest and compound interest. Held that the bond nowhere said that in case of default of payment of the first instalment the plaintiff was entitled to recover the entire amount. The right to recover the whole amount did not accrue till after the expiry of the date fixed for the second instal

ment It is open to the obligee to waive the benefit of the provision to recover the amount in case of the first default and to bring a suit after a fresh default is made And if he brings his suit within three years of the time fixed for the second payment it is within time—*Shyam Lal v Jotia* 23 A L J 896 89 Ind Cas 383 A I R 1926 All 142

Under an instalment bond the creditor was to recover from the debtor a sum of Rs 11 every year for eight years and there was a stipulation in the bond by which the obligor agreed that in case of any default in the payment of any instalment he would pay the entire amount due on the bond irrespective of the instalments None of the instalments were paid The plaintiff stated in his plaint that his claim in respect of two instalments was barred by time and that he did not want to sue for the entire sum due and thus leaving out those two instalments he sued for three instalments which fell due within three years before the institution of the suit Held that the bond did not give him an option to sue for the whole money or for some of the instalments that limitation ran from the date of the first default and that the suit was barred—*Kanhas v Anrit* 47 All 552 23 A L J 424 87 Ind Cas 162 A I R 1925 All 499 Where an instalment bond provided that if any instalment remained unpaid on its due date the creditor would be entitled to recover the whole sum at once with interest or to sue for each instalment as it fell due and remained unpaid and on default being made in the payment of instalments the creditor brought a suit not for the instalments that fell due and remained unpaid at the time but for the whole amount with interest held that Article 75 applied and limitation ran from the date of the first default—*Amolak Chand v Baijnath* 35 All 455 This view is in consonance with the rule of law prevailing in England In *Hemp v Garland* (1843) 4 Q B 419 62 R R 423 (426) it was remarked If he chose to wait till all the instalments became due no doubt he might do so but that which was optional on the part of the plaintiff would not affect the right of the defendant who might well consider the action as accruing from the time that the plaintiff had a right to maintain it The statute of limitation runs from the time the plaintiff might have brought his action unless he was subject to any of the disabilities specified in the statute This case was followed by the English Court of Appeal in *Reeves v Butcher* [1891] 2 Q B 509 In this case money was lent for a fixed period of five years subject to the payment of interest quarterly but it was provided that if any quarterly payment of interest should remain unpaid for 21 days after the same would become payable it should be lawful for the plaintiff immediately upon the expiry of such 21 days to call in and demand payment of the principal and interest then due It was held that the cause of action arose on the first default in payment of interest and that time began to run from the earliest time at which the plaintiff could have brought his action These two cases are

accepted law in England See *Halsbury's Laws of England* Vol XIX page 44

Recently the Calcutta High Court has laid down that there can be no distinction between a bond in which it is provided that on non payment of an instalment the whole amount *shall* become due and a bond in which it is provided that on non payment of an instalment the whole amount *may* be sued for In both cases limitation for a suit to recover the whole sum would commence to run on the date of the first default in the payment of an instalment (unless there is waiver)—*Basanta Kumar v Nabin Chandra* 53 Cal 277 A I R 1926 Cal 789 following *Jadab Chandra v Bhairab* 31 Cal 297 and *Hurri Pershad v Nasib* 21 Cal 542

393 Waiver —The word waiver is not defined in this Act But in Wharton's Law Lexicon it is defined as follows The passing by an occasion to enforce a legal right whereby the right to enforce the same is lost mere lving by is not waiver for this purpose there must be some *positive* act which act if done is a waiver in law Waiver may be express or implied thus where one party consents at the request of the other to extend the time for performance or to accept performance in a different mode from that contracted for there is a waiver—*Halsbury's Laws of England* Vol 7 p 423

Mere abstinence from suit is not sufficient to prove waiver of the condition that upon default of payment of an instalment the whole debt shall become due The question of waiver does not depend upon the sweet will of the plaintiff—*Kankai v Amrit* 47 All 552 *Abinash v Bama* 13 C W N 1010 *Girindra v Khir Narayan* 36 Cal 394 *Jadab Chandra v Bhairab Chandra* 31 Cal 297 *Hurri Parshad v Nasib* 21 Cal 542 *Chen Bash v Kadwai* 5 Cal 97 *Sethu v Narayana* 7 Mad 577 *Seshan v Veera Raghavan* 32 Mad 284 *Gopala v Paramma* 7 Mad 583 *Gopal v Dhondya* 8 N L R 44 *Babu Ram v Jodha Singh* 11 A L J 89 *Khairuddin v Ali Mal* 188 P R 1883 (F B) *Nobodip v Ram Krishna* 14 Cal 397 *Kanku v Pustomji* 20 Bom 109 (at p 113) *Kimatras v Sher Mahomed* 8 S L R 63 There must be either an agreement between the parties or such conduct as will itself afford clear evidence of a legal waiver—*Kankuchand v Rustomji* 20 Bom 109 Where the waiver is not express it might be implied from conduct which is inconsistent with the continuance of the right—*Kankai v Amrit* 47 All 552 23 A L J 424 Delay is not waiver inaction is not waiver though it may be evidence of waiver Waiver is a *consent* to dispense with something to which a person is entitled—*Selwyn v Garfit* 38 Ch D 284

The mere demand of an instalment does not amount to a waiver of the right to demand the whole sum—*Kanku v Rustomji* 20 Bom 109 (at p 115)

The acceptance of an overdue instalment cannot constitute a waiver —*Mohesh v Prosanna* 31 Cal 83 *Srinivas v Sheo Govind* 20 Ind Cas

156 *Gumna v Bikhlu* 1 Bom 1-5 (F B) *Ba'aji v Sakharan* 17 Bom 555 *Heralal v Budho* 1883 P J 172 *Ram Culpoo v Ram Chunder* 14 Cal 35 *Mumford v Pral* 2 All 857 Contra—*Chenibash v Kadum* 5 Cal 97 *Maharaja of Benares v Nandram* 79 All 431 *Monmohun v Durga Charan* 15 Cal 50 *Jadab Chandra v Bhasrab Chandra* 31 Cal 297 *Ram Jaxira v Ran Singh* 2 Lah L J 314 These latter decisions are in accord with the English law as laid down in *Norton v Wood* 1 R & M 178 where Lord Lyndhurst observes "If the money be tendered after the period when it became due and the person to whom it has been paid does not see fit to refuse it it is a waiver of the obligation it must be taken as a regular payment if the person receives it the day after without making any objection"

In some cases it has been held that the question whether the acceptance of an overdue instalment amounts to a waiver is a question of fact to be determined by the circumstances of the case. See *Satrucheria v Seetarama* 3 Mad 61 and *Hashiram v Paidu* 7 Bom 11 (F B) Thus when an instalment is paid some days after it becomes due and it is found that this payment is accepted as one made on account or in satisfaction of that instalment and not as a mere part payment in reduction of the whole debt and that the circumstances indicate an intention to waive the forfeiture though there is no express waiver the acceptance of the amount of that instalment constitutes a waiver within the meaning of this Article—*Vagappa v Ismail* 12 Mad 191

Where the plaintiff who is entitled in default of payment of a certain sum by the defendant to receive a much larger sum receives from the defendant on default being made by him a larger sum than that which was due at the prescribed time but one smaller than that which he was entitled to on default under the agreement he cannot be said to have waived his right to the larger amount—*Nanjappa v Nanjappa* 12 Mad 161 If the creditor has accepted several irregular payments without objection he must be taken to have waived his right to enforce the payment of the whole amount—*Sakhawat v Gajadhar* 28 All 622 A consent not to sue for the bond on failure of payment of an instalment amounts to a waiver—*Ram Chander v Rawatmull* 19 C W N 1172

In the absence of waiver if the creditor fails to sue to recover the whole amount due under the bond upon the first default being made in the payment of an instalment he will be debarred from bringing a suit for the later instalments which individually are not time barred. In other words, this Article contemplates that in the absence of a waiver an instalment bond is to be treated as a bond not permitting instalments for the purposes of limitation—*Bankay Lal v Rani Lal* 12 O L J 112 A I R 1925 Oudh 373 86 Ind Cas 918

A creditor cannot be compelled to waive the right he has acquired on the debtor's default—*Raghu v Dipchand* 4 Bom 97

394. Starting point of limitation —The terminus a quo provided by this Article is the date of first default in the payment of an instalment, and not the date of the last payment of an instalment. Thus, where a bond was payable by instalments with a proviso that the default in payment of one or more instalments shall render the whole debt due forthwith and the plaintiff recited the payment of the first two instalments and a default of the third, *h/d* that the period of limitation ran not from the date of payment of the second instalment but from the date of non payment of the third instalment in accordance with the stipulations in the contract. The plaintiff will be required to prove the fact of default of payment of the third instalment, and he will not be required to prove the fact of payment of the second instalment with reference to the provisions of sec 20—*Nand Lal v Akki*: 6 Lah 163, 26 P L R 328, 89 Ind Cas 294, A I R 1925 Lah 394

Where the plaintiff was unwilling to receive the instalments which the defendant was willing and ready to pay, it cannot be said that there was any default in payment of the instalments on the part of the defendant—*Sitharama v Krishnasami* 38 Mad 374 (383)

Demand —Where a bond stipulates for payment of a debt by instalments and in default of payment of any one instalment, for payment of the entire sum on demand by the creditor, the cause of action for recovery of the entire sum would arise when demand is made by the creditor in terms of the stipulation. In such a case the words 'on demand' have the same meaning as 'when you require' and do not mean that payment is to be made forthwith or immediately upon default—*Karunakaran v Krishna*, 36 Mad 66, *Hannantram v Bowles*, 8 Bom 561. The insertion of these words ('on demand') in the instalment bond would imply that the parties deliberately used the expression and intended to make it a condition precedent that a demand should be made if the whole debt is to be paid at once—*Seetharama v Muniswami*, 37 M L J 613. Except in transactions connected with law merchant, the words 'on demand' have meaning, and there should be a demand before the cause of action arises—*Ibid*. But when all the instalments had ceased to run, there could be no question of demand. Thus, where an instalment bond stipulated as above and a suit was brought within three years of the date of demand, but seven years after all the instalments had ceased to run, it was held that the suit was barred—*Kahappa v Gregori*, 1919 M W N 550

395. Mortgage bond —A mortgage bond containing a stipulation for payment in instalments falls under Art 132—*Narna v Amani*, 39 Mad 981, *Lachakammal v Sokkaya*, 1918 M W N 586. But, by analogy, the principle of Article 75 is applicable to cases of such bonds. In those cases, limitation will run from the date of the first default unless there is waiver—*Sitab Chand v Hyder Ali*, 24 Cal 281. See Note 554A under Art 131

76—On a promissory note given by the maker to a third person to be delivered to the payee after a certain event should happen	Three years	The date of the delivery to the payee
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396 The third column of this Article is based on the case of *Savage v Aldren* 2 Stark 32 In this case a promissory note was given to bankers to be delivered to the payee upon his producing and cancelling another note it was held that time did not run till the note was delivered by the bankers to the payee

77—On a dishonoured foreign bill, where protest has been made and notice given	Three years	When the notice is given
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78—By the payee against the drawer of a bill of exchange which has been dishonoured by non acceptance	Three years	The date of the refusal to accept
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397 Where the suit is really one to recover money alleged to be due on accounts taken between the parties the circumstance that a *hundi* and a cheque sent by the defendant to the plaintiff were dishonoured on presentation does not attract the application of this Article—*Padma lochan v Giris Chandra* 46 Cal 168

79—By the acceptor of an accommodation bill against the drawer	Three years	When the acceptor pays the amount of the bill
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80—Suit on a bill of exchange promissory note or bond not here in expressly provided for	Three years	When the bill note or bond becomes payable
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398 Cases —A suit on an unregistered bond whereby certain moveable property in the debtor's possession was pledged as security is governed by this Article—*Villa v Kalekara* 11 Mad 153

A bond which stipulates for payment of principal within three years and of interest every half year and provides that in default of such half

case would not fall under this Article but under Article 66. Thus, where money lent on a bond was made payable on a certain date, viz 28th May 1874, subject to the payment of interest every month and it was provided that if any monthly payment of interest should remain unpaid it should be lawful for the creditor immediately to call in and demand payment of the principal and interest, it was held that the cause of action accrued on the due date of the bond, i.e. 28th May 1874, and not on the date when the first unpaid instalment of interest became due—*Narain v Gouri Pershad*, 5 Cal 21. But where a bond provided that the obligee should be put in possession of land, and out of the produce thereof pay himself certain sums annually, and the balance to the obligor, and that if the obligee's receipts of produce should in any way be interfered with, the obligor should pay certain sums annually, it was held that this was a bond payable by instalments—*Ramchandra v Gokaigiri*, 1877 P J 309.

392 Option to sue for the whole amount.—A distinction should be drawn between a case where the bond provides that on default of payment of one instalment the entire amount *shall* become due, and a case in which the bond gives the creditor an *option* to sue for the whole amount *if he so chooses*. In the former case Article 75 clearly applies and limitation runs from the first default, and the creditor must sue for the whole amount then remaining due. But in the latter case Art 75 is not applicable, because the creditor is not bound to sue for the whole amount on the first default but is at liberty to sue for each instalment as it falls due—*Ajudhia v Kunjal*, 30 All 123, *Mohan Lal v Tika Ram*, 41 All 104. In these cases, the bond gave an *option* to sue and the debtor made default in payment of several instalments, the creditor brought a suit for the recovery of the unpaid instalments more than three years after the date of the first default, but *within three years from the date of default of the payment of the instalments sought to be recovered*, and it was held that the suit was not barred. See also *Nilmadhab v. Ramsaday*, 9 Cal 857 and *Asmutulla v Kally Churn*, 7 Cal 56, where it has been held that in cases where the creditor has a mere right or option to elect to recover the whole amount at once on failure in the payment of an instalment, that does not make it obligatory on the part of the creditor to recover the whole amount at once on failure in the payment of an instalment, but the creditor can exercise his power of election.

The terms of an instalment bond were that on the expiry of the term for payment of half the sum with interest and compound interest the creditor had a right to recover the amount of first instalment with interest, or to recover the entire amount after the expiry of the last term with interest and compound interest. Held that the bond nowhere said that in case of default of payment of the first instalment the plaintiff was entitled to recover the entire amount. The right to recover the whole amount did not accrue till after the expiry of the date fixed for the second instal-

ment It is open to the obligee to waive the benefit of the provision to recover the amount in case of the first default and to bring a suit after a fresh default is made And if he brings his suit within three years of the time fixed for the second payment it is within time—*Shiam Lal v Jola* 23 A L J 896 89 Ind Cas 383 A I R 1926 All 142

Under an instalment bond the creditor was to recover from the debtor a sum of Rs 11 every year for eight years and there was a stipulation in the bond by which the obligor agreed that in case of any default in the payment of any instalment he would pay the entire amount due on the bond irrespective of the instalments None of the instalments were paid The plaintiff stated in his plaint that his claim in respect of two instalments was barred by time and that he did not want to sue for the entire sum due and thus leaving out those two instalments he sued for three instalments which fell due within three years before the institution of the suit Held that the bond did not give him an option to sue for the whole money or for some of the instalments that limitation ran from the date of the first default and that the suit was barred—*Kanhai v Amrit* 47 All 552 23 A L J 424 87 Ind Cas 162 A I R 1925 All 499 Where an instalment bond provided that if any instalment remained unpaid on its due date the creditor would be entitled to recover the whole sum at once with interest or to sue for each instalment as it fell due and remained unpaid and on default being made in the payment of instalments the creditor brought a suit not for the instalments that fell due and remained unpaid at the time but for the whole amount with interest held that Article 75 applied and limitation ran from the date of the first default—*Amolak Chand v Baijnath* 35 All 455 This view is in consonance with the rule of law prevailing in England In *Hemp v Garland* (1843) 4 Q B 419 62 R R 423 (426) it was remarked If he chose to wait till all the instalments became due no doubt he might do so but that which was optional on the part of the plaintiff would not affect the right of the defendant who might well consider the action as accruing from the time that the plaintiff had a right to maintain it The statute of limitation runs from the time the plaintiff might have brought his action unless he was subject to any of the disabilities specified in the statute This case was followed by the English Court of Appeal in *Reeves v Butcher* [1891] 1 Q B 509 In this case money was lent for a fixed period of five years subject to the payment of interest quarterly but it was provided that if any quarterly payment of interest should remain unpaid for 21 days after the same would become payable it should be lawful for the plaintiff immediately upon the expiry of such 21 days to call in and demand payment of the principal and interest then due It was held that the cause of action arose on the first default in payment of interest and that time began to run from the earliest time which the plaintiff could have brought his action These two

394 **Starting point of limitation**—The terminus a quo provided by this Article is the date of first default in the payment of an instalment, and not the date of the last payment of an instalment. Thus, where a bond was payable by instalments with a proviso that the default in payment of one or more instalments shall render the whole debt due forthwith and the plaint recited the payment of the first two instalments and a default of the third *held* that the period of limitation ran not from the date of payment of the second instalment but from the date of non-payment of the third instalment in accordance with the stipulations in the contract. The plaintiff will be required to prove the fact of default of payment of the third instalment, and he will not be required to prove the fact of payment of the second instalment with reference to the provisions of sec 20—*Nand Lal v Akki*, 6 Lah 163, 26 P L R 328, 89 Ind Cas 294, A I R 1925 Lah 394

Where the plaintiff was unwilling to receive the instalments which the defendant was willing and ready to pay, it cannot be said that there was any default in payment of the instalments on the part of the defendant—*Sitharama v Krishnasamy*, 38 Mad 374 (383)

Demand—Where a bond stipulates for payment of a debt by instalments, and in default of payment of any one instalment, for payment of the entire sum *on demand* by the creditor, the cause of action for recovery of the entire sum would arise when *demand is made* by the creditor in terms of the stipulation, in such a case the words 'on demand' have the same meaning as 'when you require' and do not mean that payment is to be made forthwith or immediately upon default—*Karunakaran v Krishna*, 36 Mad 66, *Hanmantram v Bowles*, 8 Bom 561. The insertion of these words ('on demand') in the instalment bond would imply that the parties deliberately used the expression and intended to make it a condition precedent that a demand should be made if the whole debt is to be paid at once—*Seetharama v Muniswami*, 37 M L J 613. Except in transactions connected with law merchant, the words 'on demand' have meaning, and there should be a demand before the cause of action arises—*Ibid*. But when all the instalments had ceased to run, there could be no question of demand. Thus, where an instalment bond stipulated as above, and a suit was brought within three years of the date of demand, but seven years after all the instalments had ceased to run it was held that the suit was barred—*Kaliappa v Gregon*, 1919 M W N 550

395 **Mortgage bond**—A mortgage bond containing a stipulation for payment in instalments falls under Art 132—*Narna v Amani*, 39 Mad 981, *Lachakhammal v Sakkaya*, 1918 M W N. 586. But, by analogy, the principle of Article 75 is applicable to cases of such bonds. In those cases, limitation will run from the date of the first default unless there is waiver—*Sitab Chand v Hyder Ali*, 24 Cal 281. See Note 554A under Art 132.

76—On a promissory note given by the maker to a third person to be delivered to the payee after a certain event should happen	Three years	The date of the delivery to the payee
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396 The third column of this Article is based on the case of *Savage v Aldren* 2 Stark 232 In this case a promissory note was given to bankers to be delivered to the payee upon his producing and cancelling another note, it was held that time did not run till the note was delivered by the bankers to the payee

77—On a dishonoured foreign bill, where protest has been made and notice given	Three years	When the notice is given
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78—By the payee against the drawer of a bill of exchange, which has been dishonoured by non acceptance	Three years	The date of the refusal to accept
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397 Where the suit is really one to recover money alleged to be due on accounts taken between the parties the circumstance that a *hundl* and a cheque sent by the defendant to the plaintiff were dishonoured on presentation does not attract the application of this Article—*Padma lochan v Giris Chandra* 46 Cal 168

79—By the acceptor of an accommodation bill against the drawer	Three years	When the acceptor pays the amount of the bill
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80—Suit on a bill of exchange promissory note or bond not here in expressly provided for	Three years	When the bill, note or bond becomes payable
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398 Cases —A suit on an unregistered bond whereby certain moveable property in the debtor's possession was pledged as security is governed by this Article—*Vitla v Kalekara* 11 Mad 153

A bond which stipulates for payment of principal within three years and of interest every half year and provides that in default of such

yearly payments of interest it shall be optional on the part of the creditor to claim full payment of the debt, is not an instalment bond under Art 75 because a stipulation to pay interest in instalments does not bring a bond within that Article, it belongs to the category of bonds mentioned in Art 80—*Ball v Stouell*, 2 All 322, *Shib Dayal v Meharban*, 45 All 27 (F B) at p 42

A document which recites 'I shall pay you whenever you may demand after you attain the age of majority' is a promissory note, and a suit on the note is governed by Art 80 Limitation begins to run from the time when there was a demand after the creditor attained majority—*Kutiasan v Suppi*, 3 M L J 199

A bond provided that the money was to be repaid in five years, that interest was to be paid every six months, that in case of non payment of interest for four six monthly periods the creditors would have power to realise the whole of the amount due to him in a lump sum within the fixed period and that if after the time fixed the amount remained unpaid with the consent of the creditor or for some other reason then the same condition and rate of interest would be applied and maintained after the time fixed and up to the satisfaction of the amount in full In a suit to enforce the bond it was held that time ran from the expiry of the period (5 years) fixed for payment, and not from the non payment of the two years' interest—*Sham Lal v Tehariya* 18 A L J 476

Where a debt incurred on a bond was to be paid within seven years, but it was stipulated that on default to pay interest consecutively for two years it was to become payable at once, and there was a default in payment of interest for two years consecutively, held that under the term of the bond, the creditor was entitled to adopt either of the two alternatives, viz either to recall the whole of the money due thereunder on the happening of default in payment of interest for two consecutive years, or to enforce the bond at the end of seven years, and if the creditor chose not to avail himself of the first remedy but only of the second, the bond became payable, within the meaning of this Article, on the expiry of the period of seven years The debtor has no right to compel the creditor to stick to the shorter term—*Hari Lal v Thamman* 26 O C 121, 70 Ind Cas 85 A I R 1923 Oudh, 19 following *Durga v Tota Ram*, 16 O C 45 It should be noted that the learned Judge who gave the above decision in 26 O C 121, gave it reluctantly, following 16 O C 45 He was really of opinion that the word 'payable' in Article 80 meant payable at the earliest time, and that the bond in suit became payable on default of payment of two years' interest And this view has now been taken in a very recent case of the same Court In this case a bond provided for repayment of the amount in six months but the interest was to be paid month by month, and in the event of failure to pay interest in one month the creditor was to have the right to file a suit at once for the whole amount, without waiting for the stipulated

period of six months Interest was never paid *Held* that the bond become 'payable' on the occurrence of the default in the payment of first month's interest, and that a suit not brought within 3 years from the date of the first default was barred by limitation the fact that the money was stated in the deed to be payable five months later did not entitle the creditor to ignore the former date as the starting point of limitation and select the later one because it suited his convenience better He was not entitled to waive the right accruing on the first default because the right of the creditor to waive such right is recognised only by Article 75 and not by any other Article—*Pherai v Pudas* 27 O C 318 1 O W N 647 A I R 1925 Oudh 502 (dissenting from 26 O C 121 and 16 O C 45)

In case of a registered bond falling under this Article the period of limitation would be six years from the date when the bond becomes payable See *Shib Dayal v Meherban*, 45 All 27 at p 42 (F B)

If a promissory note is accompanied with a writing postponing the right to sue or postponing the date of payment the suit is governed by Article 80 and not by Article 73 See 42 All 53 and 39 Mad 129 (F B) cited under Article 73 In a suit upon a promissory note executed by the defendant in favour of the plaintiff Bank it appeared that it was customary for the Bank to fix a period for payment and that the defendant's application for the loan was in a printed form in which he added the words 'for six months *thavanas*' and on which the officer of the Bank concerned made an endorsement to the effect that the amount might be lent to the defendant for six months *thavanas* *Held* that the application form with the endorsement thereon formed part of the same transaction as the suit note and was receivable in evidence for fixing the date of payment of the amount of the note, and that the suit on the note was governed by Article 69 or 80 the starting point of limitation being six months after the date of the note—*Pannusami v Vellore Commercial Bank* 38 M L J 70

81—By a surety against Three When the surety pays the
the principal debtor years creditor

A suit by the surety against the principal debtor for recovery of moneys paid by the former on behalf of the latter is governed by Article 81 and not by Art 61—*Kunj Lal v Gulab Ram* 67 Ind Cas 364 (Lah)

A suit by a creditor against the surety being decreed in the Small Cause Court, the surety applied for review, and deposited the amount of the decree under sec 17 of the Prov S C C Act He made the deposit on the 5th September 1919 The application for review was dismissed and on the 21st of April 1920 the creditor withdrew the money The surety then brought the present suit against the principal debtor on the 20th April 1923 *Held* that the suit was within time Under this Art the date on which the creditor was paid was the date on w^h

the creditor actually withdrew the money and not the date when the money had been deposited along with the application for review because the creditor was not entitled to withdraw the money immediately it was deposited and before the application for review was dismissed—*Mahammad Naqi v Harqu Lal* 82 Ind Cas 1011 A I R 1975 All 164

82—By a surety against a co surety Three years When the surety pays anything in excess of his own share

309 The statute of limitation does not begin to run against a surety suing a co surety for contribution until the liability of the surety has been ascertained i.e. until the claim of the principal creditor has been established against him although at the time of the action for contribution the statute may have run as between the principal creditor and the co surety—*Wolmershausen v Gullick* [1893] 2 Ch 514

83—Upon any other contract to indemnify Three years When the plaintiff is actually damaged

400 Articles 81 and 83 —From a comparison of Articles 81 and 83 it would seem that Article 81 is confined to cases of loans of money or where one person is liable for a definite sum which at the time constitutes or which will at some future time constitute a debt and to suits by the surety against the principal debtor where he (the surety) has himself paid the creditor—*Madar v Ahmed* 98 P R 1881 But where the security was given for the due performance of a contract (so that the promisee could only claim damages as distinguished from a debt) and the surety had been compelled to pay such damages a suit by the surety against the principal debtor to be indemnified for the amount paid would fall under Article 83

401 Contract to indemnify —The word contract in this Article does not mean an express contract it would include both express and implied contracts—*Ram Barat v Sheodan* 16 C W N 1040

It has been held by the Madras High Court that the legal obligation of a principal to indemnify an agent under section 222 of the Contract Act is not a contract to indemnify within the meaning of this Article—*Kandasami v Avayamalai* 34 Mad 167 (1911) But the Lahore High Court (then Chief Court) holds that the right of an agent to be reimbursed by his principal in respect of losses sustained by the agent in his agency is a direct consequence of the contractual relationship of principal and agent and a suit to enforce that right is governed by this Article—*Manghi Ram v Ramsaran Das* 73 P R 1915 Plaintiffs were commission agents At the request of the defendants they purchased a quantity of gram for them and paid the price out of their own pocket Subsequently they sold the gram at a loss and instituted the present suit for the recovery

of the loss *Held* that the suit was governed by this Article—*Kadari Pershad v Har Bhagwan* 3 Lah L J 65 66 Ind Cas 900

A suit to recover the losses alleged by the plaintiffs to have been sustained by them in certain dealings in some articles of trade which they undertook as commission agents on behalf of the defendants is not a suit for money payable on accounts stated between the parties under Art 64, but a suit governed by Article 83—*Munshi Ram v Bhagwan* 27 P L R 32, 92 Ind Cas 595 A I R 1926 Lah 152

The question whether a provision in a sale-deed that the vendee should pay off a debt due from the vendor is or is not a contract to indemnify is purely a question of construction depending on the wording of the document in each case. Where the property so transferred was worth more than the amount of the debt which the vendee undertook to discharge, and the discharge of the debt was the only consideration for the transfer, the contract to pay the debt implies a contract to indemnify. But where the gist of the transaction is simply that the vendor leaves part of the consideration in the vendee's hands with a direction that he shall pay the vendor's debts, it would be open to the vendor to sue the vendee as soon as the vendee fails to pay the debts after they have become due, and the words of such a covenant would not amount to a contract to indemnify—*Kaliyammal v Kolandavela* 5 L W 228

The plaintiff executed a bond in favour of U and borrowed money of which the defendant had the whole benefit. A suit brought by U against the plaintiff for the money was compromised and the plaintiff had to pay the money in terms of the compromise. A suit by the plaintiff against the defendant for the recovery of money paid by the plaintiff under the compromise was a suit on a contract to indemnify under this Article—*Girraj v. Mulchand*, 29 All 627

Where the covenant to indemnify is contained in a registered instrument, the suit will be governed by Article 116 read with Article 83. Thus, A and B exchanged lands under a registered deed which contained a clause to the effect that there was no dispute in respect of the said lands, and that if disputes should arise, the respective party should be answerable to the extent of his private property. A was deprived of some of the lands he got by the exchange, and he sued B on the aforesaid covenant, for the value of the lands of which he was dispossessed. It was held that the suit fell within Article 116 read with Art 83 of the Limitation Act (and not under Article 113), and was in time if brought within six years from the date of the deprivation, although more than six years after the date of the exchange—*Srinivasa v Rangasami*, 31 Mad 452. Similarly, one S sold certain immoveable property under a registered sale-deed. The consideration money was Rs 3900, out of which Rs 2000 was to be paid by the vendees to a mortgagee, and in the event of the mortgage money being in excess of Rs 2000, S was to be liable for such excess. The vendees

were forced to sue the mortgagee for redemption and obtained a decree on 21st July 1911 on payment of Rs 3100. This payment was made on 5th December 1911 and on 20th July 1916 the vendees brought the present suit against S for recovery of Rs 1100 as well as the costs of the redemption suit. *Held* that suit fell under Article 116 read with Article 83 and time ran from the date when the plaintiffs were actually damaged i.e. on 5th December 1911 when the payment was actually made by the plaintiff and that the suit was within time—*Abd ul Aziz v Md Bahish* 2 Lah 316.

Where in addition to the contract to indemnify a charge is created the suit will be governed by Article 132 and not by this Article—*Rangasami v Kuppusami* 1921 M W N 472 66 Ind Cas 554.

402 Commencement of limitation.—The assignee of a lease is under an implied obligation in the absence of an express covenant to indemnify the assignor for breach of covenants and in a suit by the assignor against the assignee to recover the damages paid by him (assignor) to the original lessor limitation runs only from the time when the plaintiff was actually damaged i.e. when damages were actually recovered from him by the original lessor—*Pepin v Chunder Seekur* 5 Cal 811.

Where a portion of the mortgaged property was sold subject to the mortgage but the buyer having failed to pay off the mortgage the mortgagee sued on his mortgage and the whole of the mortgaged property was sold in execution of the mortgage decree and the seller was dispossessed of the lands which had been retained by him a suit by the seller for damages against the buyer was governed by this Article and time ran from the date when the seller was actually damaged viz the date of dispossession—*Ram Baral v Sheodani* 16 C W N 1040.

In 3 Lah L J 65 (cited above) it was held that time ran from the date when the plaintiff purchased the gram out of their own money. But this seems to be hardly correct for the plaintiffs were actually damaged not when they purchased the gram but when they sold it at a loss.

Claim to indemnity by way of set off—When a suit is brought for the recovery of the price of goods supplied (the contract for supply of goods being evidenced by a deed containing a clause for indemnifying the defendants in case of default in supplying goods at the time fixed) and the defendants claim damages for irregular supply of goods by way of set off limitation in respect of the set off will run up to the date of the suit by the plaintiff and not up to the date on which the set-off is claimed by the defendants—*Pragi v Maxwell* 7 All 284.

84—By an attorney or vakil for his costs of a suit or a particular business, there being	Three years	The date of the termination of the suit or business, or (where the attorney or vakil pro-
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no express agreement
as to the time when
such costs are to be
paid

perly discontinues the
suit or business) the
date of such disconti-
nuance

403 Scope.—This Article applies only to *suits* it does not apply to an *application* by an attorney for enforcement of payment of costs by a summary order of the High Court under the High Court Rules. Such an application is not governed by any other Article so that it is exempt from the law of limitation even Article 181 does not apply because it is not an application under the Civil Procedure Code—*Abba Haji Ishmail v Abba Thara* 1 Bom 253 *Madia v Purshotan* 3 Bom 1 *Narendra Lal v Tarubala* 25 C W N 800

Where such application involves any inquiry it should not be dealt with by the summary procedure provided by the High Court Rules. The proper course for the attorney in such a case would be to bring a regular suit and the suit must be instituted within the period prescribed by this Article—*Lakshman v Dwijendra* 46 Cal 249

An application under section 24 of Act XV of 1859 is a business within the meaning of this Article—*Watkins v Fox* 22 Cal 943 (949)

404 Termination of suit.—The time of limitation for an action by a Vakil for recovery of the costs of a suit is to be computed from the termination of the suit and the termination of a suit is the date when judgment is given in the Court in which the suit was commenced—*Bal Krishna v Govind* 7 Bom 518 *Watkins v Fox* 22 Cal 943. But when an appeal is brought and the same Vakil or Attorney continues to conduct the suit in appeal that will be a continuation of the original suit and time will not run until the disposal of the appeal—*Harris v Quine* L R 4 Q B 653 at p 658. See also 36 Cal 609 (611) where the attorney acted in the suit as well as in the appeal.

Execution proceedings are not part of a suit. A suit can ordinarily be said to terminate when there is nothing more to be done in it except execution. The fact that the attorney may have to appear in execution proceedings cannot postpone his right of action for costs which arises as soon as the judgment is passed—*Administrator General v Chunder Cant* 22 Cal 952 (Note)

Proceedings taken in connection with the taxation of the costs are not part of the suit in which the attorney was engaged. The suit terminates as soon as the judgment is delivered and the period of limitation for an action by the attorney for the recovery of his costs begins from the date of judgment—*Watkins v Fox* 22 Cal 943 *Rothery v Munnings* 1 B & Ad 5. The taxation of the costs is not a condition precedent to the institution of the suit for costs by the attorney—*Makham Lal v Nalin* 35 Cal 171 (175). But the Madras High Court is of opinion that after

judgment is given it is the duty of the solicitor to see that the decree is properly drawn up and the suit does not end until the costs are regularly taxed and inserted in the decree and the decree is issued—*Narayana v Champion* 7 Mad 1 And it has been held in a later Calcutta case that the period of limitation for the attorney's action for the recovery of his costs runs from the date of the last work done by the attorney in relation to the suit in which he was engaged and the work includes the taxation of costs in the suit and appeal in which the attorney has acted The attorney's cause of action does not arise until the costs are taxed for until taxation the amount payable by the client cannot be ascertained—*Atul Chunder v Lakshman* 36 Cal 609

A compromise between the parties not made through or certified to the Court is not a termination within the meaning of this Article A solicitor was retained in July 1871 to execute a decree In November 1871 a prohibitory order was made in the case after which the solicitor did nothing more in the matter In June 1872 the decree holder and judgment debtor settled the matters in dispute between them without the knowledge of the solicitor but this compromise was not made through or certified to the Court which passed the decree In a suit brought in December 1875 by the solicitor against the decree holder to recover the amount of his bill of costs it was held that the compromise did not terminate the business for which the solicitor was retained and that the plaintiff's claim was not barred by this Article—*Hearn v Bapu* 1 Bom 505

405 Costs —The word costs in this Article does not mean only the out-of-pocket expenses of the legal practitioner but includes also the remuneration payable to him—*Rajah of Visianagram v Narasinga Row* 29 Ind Cas 763 (Mad)

85—For the balance due on a mutual open and current account where there have been reciprocal demands between the parties	Three years	The close of the year in which the last item admitted or proved is entered in the account such year to be computed as in the account
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406 Mutual, open and current account —An open account is one which is continuous or current uninterrupted or unclosed by settlement or otherwise consisting of a series of transactions An account current is an open or running account between two or more parties or an account which contains items between the parties from which the balance due to one of them is or can be ascertained Mutual accounts are such as consist in reciprocity of dealings between the parties and do not embrace those having items on one side only though made up of debits and

credits An account under which one party has merely received and paid monies on account of the other is not a mutual account properly so called Each party must receive and pay on account of the other—*Ram Pershad v. Harbans*, 6 C L J 158, *Fyzalaa Bank Ltd v Ram Dayal*, 4 P L T 571 *Ebrahim Ahmed v Abdul Haq*, 8 L B R. 149, *Gopal Rai v. Firm Harchand Ram*, 3 P I T 492, A I R. 1922 Pat 364

For an account properly to be called a mutual account, there must be mutual dealings in the sense that both parties come under mutual liability to each other—*Piddich v Hurst* 19 B-1V 575

To constitute a mutual account there must be transactions on each side creating independent obligations on the other, and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharges of such obligations—*Shiva Gowda v Fernandes*, 31 Mad 513, *Velu Pillai v Ghose Mahomed*, 17 Mad 293; *Kunhikuttu v Kunhammad* 44 M L J 184, *Ratan Chand v Asa Singh*, 4 Lah L. J 217, A I R 1922 Lah 188, *Ganesh v Gyanu*, 22 Bom 606; *Salappa v Annappa*, 47 Bom 128 (136), *Chittar Mal v Behari Mal*, 32 All 11, *Gopal Rai v Firm Harchand Ram*, 3 P L T 492

The test of mutuality is, that the dealings between the parties should be such that the balance is sometimes in favour of one party and sometimes in favour of the other An account which consists of entries of payments made by one party in deduction of a debt to another and of payments made by the latter on behalf of the former, is not a mutual account—*Gopal Rai v Firm Harchand Ram*, 3 P L T 492 66 Ind Cas 30, A I R 1922 Pat 364 A mutual account is not merely one where one of two parties has received money and paid it on account of the other, but where each of two parties has paid on the other's account—*Phillips v Phillips*, (1852) 9 Hare 471.

Thus, where the plaintiff alone has been the banker making advances and receiving part payments from time to time, and the balance has always been in plaintiff's favour, the account cannot be said to be a mutual account—*Budh Ram v Rai's Ram*, 1916 P W R 103, *Kunhikuttu v Kunhammad*, 44 M L J 184 Where the account of the plaintiff Bank showed that the defendant borrowed a sum of money, and on various dates during the period of the account certain sums were paid by the defendant which were all credited to the account and set off against the pre-existing debt, and the account never showed any balance in favour of the defendant, held that the account indicated nothing more than the record of a loan transaction, and the payments made by the defendant were made in part discharge of the obligation under which he lay with respect to the Bank; the account was not a mutual account within the meaning of this Article—*Bank of Mutian Ltd v Kamta Prasad*, 39 All 33 Where periodical consignment of goods was made by the defendants to the plaintiffs simply and solely

on account of antecedent loans advanced by the plaintiffs and with a view to reduce the balance due thereunder, *held* that there was no mutuality and reciprocity between the parties, and the suit for recovery of the sums due did not fall under this Article—*Shiva Gowda v Fernandez*, 34 Mad 513

But where the plaintiff advanced money to the defendant and the latter consigned goods to the former for sale on commission it was held that there were independent obligations on both sides, because there existed on the one side between the plaintiff and the defendant the relation of creditor and debtor and on the other side between the defendant and the plaintiff that of principal and agent, and the account between the parties was a mutual open and current account—*Namberumal v Kottayya*, 14 M L T 498 21 Ind Cas 773, *Ratan Chand v Asa Singh* 4 Lah L J 217 A I R 1922 Lah 188 Where A supplies B with one kind of goods or work and obtains from him another kind, debiting him with the cost of the former and crediting him with the value of the latter, *held* that it was a case of mutual account—*Srinath v Park Pillar*, 5 B L R 550, *Sitayya v Rungareddi* 10 Mad 259 Where there are entries on one side showing cash advances, price of cloth sold payment made to third person on behalf of the defendants for things supplied and commission charged for purchases made by the plaintiff for the defendants, and on the other side there are entries showing that the plaintiff firm received various kinds of grain from the defendants and having sold them in the market credited the proceeds to the defendant the suit comes under this Article—*Abdul Haq v Firm Shivaji Pam* A I R 1922 Lah 338, 71 Ind Cas 259 Where the plaintiff sometimes borrowed money from the defendant, and the defendant sometimes borrowed from the plaintiff *held* that there was a mutual account—*Ganesh v Gyannu*, 22 Bom 606 Where accounts have been kept from year to year extending over a period of 20 years in which the balances have been drawn every year but no formal adjustment has been made at any time between the parties and there is nothing to shew that the payments made by the defendants to the plaintiff were mere part payments of the advances already made, *held* that this was really a business account on either side and that there was a mutual open and current account—*Salappa v Annappa* 47 Bom 128 (135), 24 Bom L R 1284 A I R. 1923 Bom 82

In banking transactions where the balance is now on one side and then on the other and the change does not appear to arise from a merely accidental and passing over payment, Article 85 is applicable—*Sewa Ram v Mohan Singh* 44 P R 1886

It is not necessary to constitute a mutual account that the accounts should be kept by both the parties Where, it was shewn that the accounts were going on between the parties, and balances were struck and entries were made sometimes to defendant's debit, and sometimes to his credit the mere fact that the accounts were kept by one party only was no sufficient

cause for holding that the account was not a mutual open and current account—*Jas Ram v Attarchand* 16 P R 1316 30 Ind Cas 491 A employed B as his agent to manage certain boats for which he was to receive a commission B alone kept accounts in which he credited the sums received from the hire of boats and debited the amounts which had been paid for their upkeep and the commission due to him Held that this account showed reciprocal demands and that it fell under this Article—*Lakshmayya v Jagannatham* 10 Mad 199

In Madras it has been held that it is not even necessary that an account in order to be a mutual account should have been kept in writing it is sufficient if the dealings amounted to mutual debit and credit on both sides and if the account is kept in writing it is enough if one of the parties kept it so—*Lakshmayya v Jagannatham* 10 Mad 199

The fact that the balance is a shifting one sometimes in favour of the plaintiff and sometimes in favour of the defendant though valuable as an index of the nature of the dealings is not a decisive test as to the mutuality of the account—*Ganesh v Gyanu* 2 Bom 606 *Ram Pershad v Harbans* 6 C. L. J 158 *Thupatti v Ranga Charlu* 23 M. L. J 516 A shifting balance is a test of mutuality but its absence is not conclusive proof against mutuality—*Ram Pershad v Harbans* 6 C. L. J 158 *Velu v Ghosh* 17 Mad 293 *Ganesh v Gyanu* 2 Bom 606 If there is a balance in favour of either party it follows that there must be mutual liabilities of both parties to each other If the balance is always in favour of one party in the very nature of the transactions then the case is one in which there are not separate mutual dealings In order to prove a mutual open and current account it is sufficient to prove mutual dealings between the parties consisting of sales made or services performed by each party to or for the other creating mutual duties or reciprocal demands—*Kunhi Kutthali v Kinkhammad* 44 M. L. J 184 A. I. R 1923 Mad 278 *Ram Pershad v Harbans* (supra)

The mere fact that the defendants have been debtors throughout does not show that the accounts were not mutual Whether an account is mutual or not depends upon the nature of the dealings between the parties It is sufficient for an account to be mutual if the dealings are such that the balance might have been in favour of either party it is not essential that the balance should in fact have been in favour of the defendants at some stage—*Satappa v Annappa* 47 Bom 128 (135) 24 Bom L. R 1284 A. I. R 1923 Bom 82

It has been held that this Article is intended to apply to cases where an account has been going on between two parties and balances have been struck from time to time showing the amount due from one of such parties to the other, and the suit to which this Article is intended to apply is a suit brought by one of those parties against the other for the balance found to be due on that account—*Laljee v Roghunundun* 6 Cal 447 But this

A title does not require that the balances should have been actually struck. It simply requires that the account should be such that if the balances were actually struck at various times the balances at those times should have been sometimes in favour of the plaintiff and sometimes in favour of the defendant.

It is not correct to say that an account is closed whenever a balance is struck until it is re opened by fresh dealings. Where it appears that there were mutual dealings and that though balances were struck from time to time there were mere acknowledgments and not agreements to pay *he'd* that the case was not one of a closed account (Art 64) but of a mutual open and current account. The mere fact that there were no further transactions between the parties since the striking of the last balance did not change the nature of the account for it cannot be held that an account becomes closed whenever a balance is struck—*Jwala Das v Hukum Chand* 66 Ind Cas 387 A I R 1922 Lah 316.

407 Reciprocal demands.—An account is mutual when each has a demand or right of action against the other and therefore unless both the parties could during the currency of the account each have said to the other I have an account against you there can be no mutual account—*Hajee Syud v Ashrafunnissa* 5 Cal 759 (763). And therefore if the balance was sometimes in favour of the defendant but generally in favour of the plaintiff the banker the account would not be a mutual one—*Ibid*. But it is not necessary that the parties in the course of their dealings should have made actual demands upon one another. This Article applies where the nature of the business between the parties is such as to give rise to reciprocal demands i.e. where the dealings are such that sometimes the balance may be in favour of one party and sometimes of the other—*Narandas v Vissandas* 6 Bom 134. *Khushalo v Behari* 3 All 523. *Satappa v Annappa* 47 Bom 128 (136). *Fyzabad Bank v Ramdayal* 4 P L T 571. Where the accounts are such that the defendants could not have made any such demand during the business of the account the requirements of this Article have not been fulfilled—*Hardilal v Pukhar Das* 3 Lah I J 362.

408 Limitation.—The period of limitation runs from the close of the year in which the last item was admitted or proved. If a mutual open and current account be adjusted in the middle of a current year and in that year there is entered one item admitted or proved limitation will run from the end of the year and not from the date of the adjustment—*Ganesh Lal v Sheogolam* 5 C L R 211.

Where the last item in a mutual open and current account was advanced to the defendants within limitation but this item was advanced more than three years after the close of the year in which the last preceding item was entered the suit is barred by limitation in respect of the previous account—*Gobind Ram v Jawala Ram* 1 Lah 12.

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| 86 —On a policy of insurance, when the sum assured is payable immediately after proof of the death or loss has been given to or received by the insurers | Three years | When proof of the death or loss is given to or received by the insurers, whether by or from the plaintiff or any other person |
| 87 —By the assured to recover premia paid under a policy voidable at the election of the insurers | Three years | When the insurers elect to avoid the policy |
| 88 —Against a factor for an account | Three years | When the account is, during the continuance of the agency, demanded and refused, or where no such demand is made, when the agency terminates |
- 4-9 A factor is an agent who is entrusted with the possession of goods for sale on account of his principal
- Demand Refusal, Termination of Agency* —See Notes 415 and 416 under the next Article
- The agency of a person entrusted to sell goods on behalf of the plaintiff does not terminate when the goods are sold and the money is received by the agent therefore limitation does not begin to run when any portion of the goods is sold but only from the date of demand made by the principal during the time the price remains unpaid by the agent—*Babu Ram v Ram Dayal*, 12 All 541, *Fink v Buldeo* 26 Cal 715
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| 89 —By a principal against his agent for moveable property received by the latter and not accounted for. | Three years | When the account is, during the continuance of the agency, demanded and refused, or where no such demand is made, when the agency terminates, |
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It should be noted that Articles 88, 89 and 90 apply only to suits by *principals* against agents. suits by *agents* against principals are not provided for in these Articles

410 Suit for account and money —This Article applies to a suit by a principal against his agent for an account and for any money that may be found due on such account being taken, the phrase "moveable property" includes money—*Shib Chandra v Chandra Naran*, 32 Cal 719, *Haferuddin v Jadunath* 35 Cal 298, *Pran Ram v Jagadish* 49 Cal 250 (252) *Venkatachalam v Narayanan* 39 Mad 376, *Jogendra v Debnath* 8 C. W N 113, *Madhab v Debendra*, 1 C L J 147; *Asghur Ali v Khurshed* 24 All 27 (P C) A suit for recovery of money found due on an account and a suit for account are really one and the same thing—*Jhapajhannessa v Bamasundari* 16 C W N 1042, 16 Ind Cas 414

A suit by a principal against his agent for an account as a preliminary step to enable the principal to recover from the agent the moneys received by him and not accounted for, is governed by this Article but so far as it seeks to obtain certain *account papers* from the agent, the suit is governed by Article 120 and the cause of action arises from the date when such papers are to be submitted to the principal according to the contract between them—*Madhab v Debendra* 1 C L J 147

Where a suit is instituted against an agent for the recovery of a definite sum and there is a prayer that the amount stated in the plaint or any larger sum proved by the decision of the Court to be due by the agent may be decreed to be paid it is virtually a suit for an account—*Hurronath v Krishna* 14 Cal 147 (P C)

Even where there is a *contract* to render account year by year, a suit by the principal against his agent for such account is governed by this Article (which is more specific) and not by Art 115 which is only a residuary Article relating to contract—*Bhabatarani v Sheikh Bahadur*, 30 C. L J 90, *Venkatachalam v Narayana* 39 Mad 376 (380); *Pran Ram v Jagadish* 49 Cal 250 (253) *Jogindra v Ghina Muhammad*, 4 Pat 289 *Madhusudhan v Rakhal*, 43 Cal 248 (dissenting from *Jogesh v Benode*, 14 C W N 122 *Debendra v Sheikh Esha* 14 C W N 121 and *Easin v Barada* 11 C L J 43) In the last three cases as well as in *Moti Lal v Amin*, 1 C L J 211 the suit was held to be governed by Article 115

A suit by plaintiffs against their step mother for recovery of their father's property which she was managing on behalf of the family under an arrangement, is governed by this Article or Article 90, so far as the moveable property is concerned and by Art 120 or 144 in respect of immoveable property—*Kaliy v Dukhes*, 5 Cal 692

A sm^t for accounts against the agent in respect of money alleged to have been improperly advanced by him to counsel for purposes of litigation of the principal is governed by this Article and the agent is bound to prove that the moneys drawn by him for payment as illegal

gratification to the counsel reached their destination—*Fox v Bens* 13 C. W. N. 212

A suit by a principal against an agent to recover a specified sum of money lent by the agent to persons to whom he was not authorized to lend the money falls under this Article and not under Art. 90 as such a suit is really a suit for mere money account—*Muthiah v Alagappa* 41 Mad. 1

If after partition among the members of a joint Hindu family one tenant in-common collects the family debts which were left undivided at the time of partition it may be implied that he realises the debts as an agent of the other members. Consequently a suit against him by the other members may fall under this Article—*Yerukola v Yerukola* 45 Mad. 648 42 M. L. J. 507 A. I. R. 1922 Mad. 150

411 Suit to enforce a charge.—Where immoveable properties were hypothecated to the principal by the agent as security for the proper discharge of his duty a suit by the principal against the agent for recovery of the sums found due upon adjustment of accounts by sale of the properties hypothecated is a suit to enforce a charge under Article 132 and does not fall under this Article—*Madhusudhan v Rakhal* 43 Cal. 248 (dissenting from *Jogesh v Benode* 14 C. W. N. 122 where the suit was held to fall under Art. 116) *Fran Ram v Jagodish* 49 Cal. 250 (253) *Hafsuiddin v Jadunath* 35 Cal. 298 *Troilohhya v Abinash* 21 C. L. J. 459 But where the suit is simply for an account (and not to enforce any charge) it will fall under this Article in spite of the fact that the agent has hypothecated certain properties to the principal—*Suresh v Nawab Ali* 20 C. W. N. 356 29 Ind. Cas. 848

Where the agent executed a *kabulisat* in 1305 by which he hypothecated certain properties as security against defalcation and default and was dismissed in 1306 but was reappointed in 1307 and then committed defalcation and default in 1307 and 1308 a suit for account against him would be governed by Article 89. Art. 132 cannot apply as the agent's position in 1307 after dismissal and reappointment cannot be governed by the *kabulisat* of 1305—*Behari Lal v Hara Kumar* 21 C. L. J. 458 29 Ind. Cas. 748

412 Not accounted for.—A suit contemplated by this Article is a suit in which accounts have to be taken where accounts have been rendered this Article has no application. Where an account has been taken and adjusted and a sum of money has been found due from the agent to the principal a suit to recover that sum is governed by Art. 64 or 115—*Kesho Prasad v Sarwan Mat* 21 C. W. N. 591 25 C. L. J. 335

413 Registered contract.—When the contract under which the agent is employed is contained in a duly registered instrument the suit is governed by Art. 116—*Mati v Amin* 1 C. L. J. 211 *Easin v Barada* 11 C. L. J. 43 5 Ind. Cas. 186, *Jogesh v Binode* 14 C. W. N. 122 5 Ind. Cas. 59, *Harendra v Administrator-General* 12 Cal. 357 *Mathura v Cheddu*

39 All 355 But in *Haferuddin v Jadu Naik*, 35 Cal 298 (301) and *Fran Ram v Jagadish*, 49 Cal 250 (253) the Calcutta High Court went so far as to say that even if the contract of agency is registered, the case will fall under Article 89 and not under Art 116 because the former Article is more specific than the latter

Where sums received by an agent outside the scope of the registered instrument are sought to be recovered, the three years' limitation will apply—*Harendra v Administrator General*, 12 Cal 357.

414 Suits against agent's representatives.—If after the termination of the agency by death of the agent, a suit is brought against the heirs of the deceased agent, it would not be governed by Art 89 for it cannot be said to be a suit for rendition of accounts (the liability to render accounts being *personal* to the agent, and the representatives of the agent not being liable to render accounts), but it is a suit for money payable to the principal by the representatives of the agent out of the assets in their hands—*Kumeda v Asutosh*, 17 C W N 5, 16 Ind Cas 742, *Seih Chand Mal v Kallan Mal*, 1886 P R 96, *Rao Girraj v Ram Raghunath*, 31 All 429 *Fatima v Initasi* 1 P R 1912 13 Ind Cas 930; *Rameswari v Narendra*, 5 P L T 355 A I R 1923 Pat 259 In the Calcutta case (17 C W N 5) the suit was held to be governed by Article 115 or 120, in 96 P R 1886 by Article 62 or 120, in 1 P R 1012 by Article 120, and not by Article 62 or 89 in 31 All 429, the suit was held to be governed by Article 120 and not by Art 57, 62 or 89 That is Article 120 has been held to be the most appropriate In the Patna case, the suit was held to be governed by Art 62 or 115 and not by Art 120

In an earlier Calcutta case it was held that if an agent had never been called on to render account during his life time and then he died and the agency thereby terminated the principal acquired a fresh right to have an account rendered by the agent's representatives and that right was recognised by Article 89, and limitation ran from the death of the agent (or from the date when administration was taken to the agent's estate, see 17) In other words, the legal representatives of the agent were held bound to render accounts, and the suit for such accounts was held to fall under Article 89—*Lawless v Calcutta Landing and Shipping Co Ltd*, 7 Cal 627 (632)

If the time had commenced to run during the life time of the agent (i.e., if the agency had terminated in the agent's life-time, by dismissal from service) and then the agent died, a suit against his legal representatives would be governed by Article 89 for it is based on the same cause of action as a suit against the agent himself, and the period of limitation in respect of the suit against the representatives would run from the same date as it would have run in respect of a suit against the agent himself had he lived, viz from the date of the termination of the agency, and not from the date of the agent's death—*Arunachellam v Raman Chetty* 16

M L T 614 27 Ind Cas 807 *Parthasarathi v Turlapati Subba Rao* 47
M L J 483 A I R 1924 Mad 840

In *Harender v Administrator General* 12 Cal 357 and *Mathura v Chhedu* 39 All 355 it was held that a suit against the agent's legal representatives for recovery of the amount not accounted for by the agent would fall under Article 116 if the contract of agency had been registered.

415 Demand and refusal.—There must be *express* demand and refusal it cannot be supposed that demands were going on as long as the business was in existence. In the absence of any evidence of demand and refusal limitation runs from the termination of the agency—*Nabin Chandra v Chandra Madhub* 44 Cal 1 (8) P C (reversing *Chandramadhab v Nabin* 40 Cal 108) *Bhabatarini v Shesh Bahadur* 30 C L J 90

If there has been a demand for accounts and the agent has not responded to the call there is by implication a refusal within the meaning of this Article—*Madhusudan v Rakhal* 43 Cal 248 *Pran Ram v Jagodish* 49 Cal 250 (254). This is the case also where the agent has submitted accounts but has failed to explain the account papers in spite of the principal's demand to do so—*Madhusudan v Rakhal* 43 Cal 248 19 C W N 1070

Where the agent does not refuse to render an account but promises to submit the same on a certain future date which however he neglects to do it must be held that the account was refused at the date and limitation will run therefrom—*Hori Narasi v Administrator* 3 C L R 446. But it cannot be affirmed as a general fact that the failure of the agent to render accounts necessarily amounts to a refusal when the agent while in service had been all along saying that he would render accounts. The failure to render accounts on demand may be due to various causes such as illness or delay in preparing the accounts or sometimes procrastination. The question whether the failure to render accounts amounts to a refusal depends upon the circumstances of each case—*Bhabatarini v Shesh Bahadur* 30 C L J 90 53 Ind Cas 675 *Fatima v Intani* 1 P R 1912 13 Ind Cas 930. Where the defendant was asked to render accounts repeatedly and he put it off but never refused to render accounts held that the putting off was equivalent to postponement and postponement was not tantamount to refusal on the contrary it implied an admission that an account was due and would be rendered. In such a case limitation ran from the termination of the agency—*Saiyad Hasan Imami v Debi Prasad* 3 Pat 546 5 P L T 303 A I R 1924 Pat 664 80 Ind Cas 956

Where there is a covenant to deliver accounts year by year the omission to render such accounts amounts to a refusal within the meaning of this Article—*Fasin v Barada* 11 C L J 43

Where the defendant is an agent of two joint principals limitation for a suit for account does not run until there has been a *joint* demand for account by the principals. A demand for account by one only of

the principals will not give a starting point of limitation. In the absence of a joint demand, limitation will run from the termination of the agency—*Jagdish v. Rajo Kuer*, 2 Pat 585, 4 P. L. T. 531, A. I. R. 1923 Pat. 464.

416. Termination of agency.—Under section 201 of the Contract Act, an agency is terminated, among other ways, by the principal revoking his authority, or by the agent renouncing the business of the agency or by the business of the agency being completed, and it is from this point that time is to begin to run in a suit under this Article—*Venkatachalam v. Narayan*, 39 Mad 376 (378), 28 M. L. J. 140, 26 Ind Cas 740. In *Babu Ram v. Ram Dayal*, 12 All 541 and *Fink v. Buldeo*, 26 Cal 715, the Judges expressed an opinion that an agency terminates under this Article only when the sums received by the agent have been fully accounted for by him to the principal. But this is contrary to the terms of this Article, because the words “not accounted for” indicate that the agency may terminate before the moneys are accounted for by the agent. There are where the principal revoked the authority of the agent, and the latter handed over charge to his successor, the agency terminated then and there (under sec 201 of the Contract Act) though the agent has not yet handed over to his principal the money and accounts and passed the accounts—*Venkatachalam v. Narayan*, 39 Mad 376 (dissenting from 12 All. 541 and 26 Cal 715 cited above).

The question as to when an agency terminates is a question of fact and depends upon the circumstances of each case, and not a question of law—*Muthiah v. Alagappa*, 41 Mad. 1; *Nagappa v. Chidambaram*, 31 M. L. J. 687, 36 Ind Cas 662, *Ramanathan v. Kasi*, 31 M. L. J. 685, 36 Ind Cas 804. It terminates on the date after which there have been no dealings between the parties, even though the agent had not then accounted to the principal for all monies alleged to be due to the latter—*Kuppuswami v. Veerappa*, 5 L. W. 375. In a suit for accounts by the principals against the agent, instituted on 31st May 1923, it appeared that all the transactions of purchase and sale into which the agent entered on behalf of the principals had been completed on 29th May 1920, but the parties had agreed that the accounts should be settled on the 1st June 1920. Held that the suit was not barred, because the agency did not terminate until the 1st June 1920. The 1st of June was the appointed settling day, and until that day was over it could not be said that the defendant had ceased to represent the plaintiffs as their agent and to do acts in that capacity, although the transactions of purchase and sale might have been completed on the 29th June 1920—*Lakshmi Chand v. Chajju Mal*, 91 Ind Cas 487, A. I. R. 1926 Lah 200.

In a suit for recovery of money received by the defendant as agent for the plaintiff on account of plaintiff's winnings in a lottery, the agency does not terminate when the money is received by the defendant, but continues so long as the money is held by the defendant for the plaintiff.

and the right to sue arises when the money is demanded and payment is refused—*Hormasji v Ho Hmyin* 12 Bur L T 9

The agent received a sum of money on behalf of his principal in 1902; in May 1903 disputes arose between the principal and agent in which the agent denied the principal's right to the money. But in June 1903 the agent again received another sum as agent on behalf of his principal after that date there was no demand or refusal or termination of agency. The principal filed a suit in 1907 to recover the money from the agent. It was held that the suit was not barred although the agent asserted his own right in May 1903 the adverse claim was not continued and when in June 1903 he again received the money on behalf of the plaintiff his conduct amounted to a continuation of the agency—*Nathubhai v Devidas* 12 Bom L R 951

Where an agent threw up the agency at Rangoon and came back to Madras the termination of the agency was the starting point of limitation. The fact that he went back to give evidence and again acted for a time until the principal sent a successor cannot prevent the running of time as regards the first agency provided there was no acknowledgment of liability to account after such termination—*Palanisappa v Alagappa* 39 Ind Cas 691 (Mad)

An agency determines on the death of a principal therefore a suit by the representative of the late principal against the agent for an account of money received by the agent during the late principal's life time falls under this Article because after the death of the principal the position of the agent is not altered into that of a trustee—*Nabin Chandra v Chandra Madhab* 44 Cal 17 (P C) therefore the suit should be brought within 3 years of the death even though the representative of the late principal should continue to employ the agent—*Mohendra v Jadu Nath* 9 C L J 107 *Sarashbala v Chuns Lal* 26 C W N 320 A I R 1922 Cal 53 *Girjabai v Narayan* 26 Bom L R 1165 For where on the death of the principal the agent continues in the service of his heirs the old agency terminates and a new agency independent of the original contract is created and the suit for accounts in respect of the old agency must be brought within three years of the termination of that agency—*Madhusudan v Rakhal* 43 Cal 248 19 C W N 1070

417 Account for more than three years before suit—Although a suit must be brought within 3 years still there is nothing in terms of this Article to shew that the plaintiff is entitled to accounts for only three years antecedent to suit. Thus in a suit brought in 1911 in which accounts were claimed from 1899 it was held that the plaintiff was entitled to the accounts claimed—*Suresh v Nawab* 20 C W N 356 29 Ind Cas 848 See also *Pran Ram v Jagadish* 49 Cal 250 (256) 35 C L J 111 A I R 1922 Cal 355 where in a suit instituted on 27th August 1918 a claim for accounts from 13th April 1914 was decreed

90 —Other suits by prin cipals against agents for neglect or miscon duct	Three years	When the neglect or mis conduct becomes known to the plain tiff
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418 The word *other* in this Article shows that this Article does not include suits which properly come within Article 89. A suit by a principal against an agent for the recovery of money lent by the latter to persons to whom he was not authorized to lend is a suit for an ordinary money account under Article 89 and is not therefore governed by Article 90—*Muthiah Chetty v Alagappa Chetty* 41 Mad 1 (2)

See *Puran Mal v Ford* 41 All 635 cited in Note 373 under Art 62

A suit against an agent for loss occasioned by his neglect in not suing for debts due to his principal or by so negligently selling his principal's property that the proceeds cannot be realised will fall under this Article—*Baboo Lal v Vaughan* 2 Agra 306

Plaintiff paid a certain sum to his agent (defendant) to be paid to A. Defendant not having paid the money to A the latter brought a suit against plaintiff and obtained a decree for the money. It was held that the plaintiff's suit against defendant was governed by Art 90 time began to run when the plaintiff came to know of defendant's misconduct and not from the date of payment by the plaintiff to A under the decree—*Rangasami v Srinivasa* 21 M L J 453

Where during the tenure of the office of the Chairman of a Municipal Council the manager embezzled sums of money a suit by the Municipal Council against the Chairman for recovery of the money on the ground that the embezzlement took place through his negligence in supervision is governed by Art 36 and not by Art 89 or 90 as the Chairman is not an agent of the Council although it is his duty to collect the dues and see that proper accounts are kept—*Srinivasa v Municipal Council* 22 Mad 342. But in an Allahabad case where during the tenure of the office of the Secretary and the Executive officer of the Municipal Board the head accountant embezzled sums of money it was held that the Secretary and the Executive Officer of the Municipal Board were the agents of the Board within the meaning of this Article and that a suit against the Secretary on the ground that it was his neglect of official duties (*viz* want of supervision over the cash book and over the receipt of all taxes and income of the Board) which mainly contributed to the embezzlements fell under this Article—*Mukherji v Municipal Board of Benares* 46 All 175 22 A L J 26 80 Ind Cas 241 A I R 1924 All 467. The Lahore High Court also holds that a Chairman of the Board of Directors of the branch firm of a Bank is an agent of the Bank and a suit by the Bank against such Chairman for making certain advances to some persons improperly,

malā fide and negligently falls under this Article—*Daulat Ram v Bharaj National Bank* 5 Lah 27 79 Ind Cas 740, A I R 1924 Lah 435.

419 Starting point of limitation—Limitation begins to run when the agent's neglect becomes known to the principal, and not when the principal comes to know that there is sufficient ground for a good case being run against the agent—*Janki Kōr v Mahabir*, 25 Ind Cas 706 (Cal)

Knowledge of the agent's negligence includes constructive knowledge, and the plaintiff must be deemed to have got constructive notice of the defendant's negligence when it was first reported in the office of the plaintiff that some rents had become time barred through the defendant's negligence to collect them—*Anand Parshad v Perbhu Narain*, 6 Ind, Cas 456

91—To cancel or set aside an instrument not otherwise provided for	Three years	When the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him.
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420 Where Article does not apply—This Article will not apply when the cancellation of a document is not an *essential* part of the plaintiff's relief—*Unni v Kunchi* 14 Mad 26 *Shankaran v Keshavan*, 15 Mad 6 (10), *Puraken v Parvathi* 16 Mad 138, *Ridhu v Malah*, 1925 P W R 96 Where in a suit some substantial relief (e.g. recovery of some property) is prayed for, and the cancellation of the instrument is merely incidental or auxiliary to such relief, this Article does not apply—*Bachchan v Kamta* 5 Ind Cas 585 *Sundaram v Sithammal*, 16 Mad 311 *Abdul Rahim v Hirparam* 16 Bom 186, *Muhammad v Mango Mal* 22 All 90, *Uma Shankar v Kalha* 6 All 75, *Ramausar v Raghubir* 5 All 490 *Hazan v Jadaun* 5 A'l 76 (per Straight J) ; *Bageshra v Sheo Nath*, 14 A L J 164 Thus—

(1) This Article does not apply where the instrument is *null and void*. Such document need not be set aside and the plaintiff can bring a suit for possession or other relief without praying for cancellation of the instrument, even if he prays for its cancellation, he does so only incidentally. Thus a deed of gift executed by a Hindu widow transferring the bulk of the property to an idol is void and not voidable, to a suit to set aside the gift this Article does not apply—*Chooramoni v Baidya Nath*, 32 Cal 473 A document which was never intended by the executant to be operative and which was not properly signed by him is a nullity, it does not require to be set aside by the person entitled to the possession of the property as against the person in whose favour the document stands—*Banku v. Krishna Govinda*, 30 Cal 433. An alienation of joint family property by a coparcener without the consent of the other coparceners is void ;

not necessary to have the deed of gift set aside, and Art 91 has no application—*Muk'abai v Karam*, 7 A L J 783 An alienation of the office of trustee by the hereditary trustee is void and need not be set aside; therefore a suit to recover the estate from the alienee is governed by Art 124 and not by this Article—*Narayana v Lakshmanan* 39 Mad 456 A *benami* conveyance is an inoperative instrument and need not be set aside. A suit to recover the property comprised in the conveyance is not governed by Art 91 but by Art 144 of the Act—*Petherpermal v Miumandy*, 35 Cal. 551 (P C). *Sham Lal v Amarendra* 23 Cal 460 The alienation of temple property by a trustee is null and void and need not be set aside, consequently a suit by the succeeding trustee to recover the property is not governed by this Article—*Shao Shankar v Ram Sewak*, 24 Cal 77 A suit to recover possession of property alienated by a Hindu widow is not governed by this Article, when the alienation is found to be sham—*Manchcharam v Panabhai*, 40 Bom 51 Where it is established that the plaintiff by defendant's misrepresentation was got to execute a deed of sale believing the same to have been a deed of a different kind, the transaction is void and not voidable only, and Art 91 has no application to a suit to recover the property which passed under the void sale deed—*Sanni Bibi v Siddik Husain*, 23 C W N 93 Where the plaintiff brought a suit for a declaration that a deed of gift executed by her was void and inoperative, as she signed the deed believing, on account of the fraud and misrepresentations of the defendant, that it was only a power of attorney, and she also prayed for a declaration of title in the properties gifted *held* that the deed of gift was void *ab initio*, and did not require to be set aside. Consequently, the suit was governed not by Art 91 or 95 but by Article 120—*Sarat Chandra v Kanas Lal*, 26 C W N 479 Where the claim was not to set aside the sale deed, but for a declaration that from its very inception it was a sham transaction, *he'd* that there was no necessity for the plaintiff to have the deed set aside, and therefore this Article did not apply—*Jagardas v Phulhari*, 30 All 375 Where the plaintiff (a person of weak mind) was got to execute a deed of sale or mortgage in favour of the defendant by fraud of the latter, and no consideration passed under the deed *held* that the deed was a nullity and it is not necessary for the plaintiff to have it set aside under this Article; he can bring a suit to recover possession under Article 144—*Sundaram v Sithammal*, 16 Mad 311, *Abdur Rahim v Kriparam*, 16 Bom 186, *Boo Jinaihoo v Shah Nagar*, 11 Bom 78 Where during the minority of the plaintiff, a property belonging to him was alienated to the defendant by a person who was not his lawful guardian, and without any necessity, the deed was void, and a suit by the minor after attaining majority is governed by Art 142, and not by Article 91 or 44—*Sajjad Ali v Zulfikar*, 1916 P R 83, *Anandappa v Totappa*, 17 Bom L R 1137, *Ramausar v Raghubar*, 5 All 490; *Narsugauda v Chaturagauda* 42 Bom 638 (F B), *Uttam Singh v Barkat Ali*, 15 P R 1913, *Sardar Shah v Haji*, 28 P. R. 1909, *Husain*

v Rajaram 10 N L R 133 Where no consideration passed under the sale deed and the defendant never obtained possession under it no suit is necessary to set aside the deed Article 144 and not 91 applies—*Nabab Mir Sayad v Yasin Khan* 17 Bom 755 Where a deed of gift is executed by a person governed by the Muhammadan law and the possession of the property comprised in the gift has not been delivered the gift would be void *ab initio* and no question of limitation will arise as regards a suit to set aside the deed of gift But if afterwards the defendant takes possession the gift becomes operative by law and the period of limitation for a suit to set aside the gift runs from the moment the defendant takes possession —*Mulani v Maula Bakhsh* 46 All 260 (262 263) Where the plaintiff executed a registered sale deed in favour of the defendant and the defendant executed a receipt in favour of the plaintiff stating I shall without any objection give up your land at any time you may ask me to give up and it was proved that no consideration passed under the sale deed held that the sale-deed was a mere paper transaction and inoperative and a suit to recover possession of the land was governed by Article 144 and not by Art 91—*Sangawa v Huchangowda* 48 Bom 166

(2) Secondly this Article does not apply where the transaction though a voidable one does not require to be set aside through the intervention of the Court Thus where the certificated guardian of a minor had granted a perpetual lease of the minor's property without the sanction of the Court the transaction is a voidable one and it is not necessary for the minor (after attaining majority) to bring a suit to have the instrument of lease cancelled He can simply repudiate the transaction and bring a suit for possession—*Abdul Rahman v Sukhdayal* 28 All 30 So also where a widow had granted a lease for a period extending beyond her own life a suit by the reversioner to recover possession of the property was governed by Art 141 and not by this Article Such an alienation is voidable at the election of the reversionary heir who may treat it as a nullity without the intervention of the Court and he can show his election to do so by commencing an action for recovering possession of the property the cancellation of the lease is not a condition precedent to the right of action of the reversionary heir—*Bijoy Gopal v Krishna Mohishi* 34 Cal 329 P C (reversing *Bijoy Gopal v Nilratan* 30 Cal 990) *Harikar v Dasarathi* 33 Cal 257 *Rakhmabai v Keshab* 31 Bom 1 Similarly where a Hindu widow in possession of her husband's estate sold the property and then adopted the plaintiff and died a suit by the adopted son to recover possession of the estate from the purchaser was not governed by Article 91. There is no essential difference between the position of the adopted son seeking to enforce his rights with reference to the property alienated by the widow before the adoption and the position of a reversioner seeking to enforce his rights with regard to the property alienated by the widow before death The adopted son was not required to set aside the sale also

than a reversioner. The suit was governed by Article 144 and not by Art 91—*Hanam Gowda v Irgowda* 48 Bom 654 26 Bom L R 829 A I R 1925 Bom 9. A suit by a landlord to avoid a transfer made by a tenant in contravention of section 43 of the C P Tenancy Act is not governed by this Article. The landlord is not bound to set aside the transfer and may sue for possession treating the transferee as a trespasser—*Sagunchand v Chha bilram* 18 N L R 11 A I R 1922 Nag 60.

The members of a tarwad need not sue to set aside an alienation made by the karnavin but can sue to recover possession on the strength of title because the alienation is not binding on the tarwad. Consequently Article 91 does not apply to a suit to recover possession of the property alienated but Article 144 would apply—*Kanna Panikkar v Nanchan* 46 M L J 340 A I R 1924 Mad 607 78 Ind Cas 564.

(3) *Thirdly* this Article does not apply where the suit was not to *cancel* or set aside an instrument but only to amend it by substituting the name of the plaintiff for the name of another person mentioned in the deed. Thus where the plaintiff asks for a declaration that the first defendant whose name appears as lessee in a certain lease-deed has no interest under the lease and that the person really interested under the lease is the plaintiff himself for whom the first defendant acted as *benamidar* held that the suit does not fall under this Article but Art 120 as the plaintiff does not ask to annul the lease itself—*Rasari Lal v Chidammi* 35 All 140.

Similarly this Article does not apply where the plaintiff does not seek to *cancel* the instrument but simply asks for a declaration that his own interests are not affected by it. Thus where a relation of the plaintiff executed in favour of the defendant a sale deed by which he professed to transfer the whole of a joint family property one fourth of which belonged to the plaintiff and the plaintiff brought a suit asking that he might be maintained in his joint possession of the property by cancellation of the deed so far as it is injurious to his rights held that the suit was not one to *cancel* the sale-deed because the plaintiff cannot dispute the validity of the deed except in so far as it affects his rights. Article 120 governs the case—*Din Dayal v Har Narayan* 16 All 73.

(4) *Fourthly* this Article does not apply where the plaintiff was not a party to the instrument sought to be avoided. This Article is restricted to a suit between the parties to the instrument or their successors in interest. Where the instrument was not executed by the plaintiff (or his predecessor) he is not bound to set it aside and this Article does not apply—*Vithu v Devdhas* 15 N L R 55. *Kunjulal v Chandra* 17 N L R 169 64 Ind Cas 775. *Ganapa ji v Sivamalai* 36 Mad 575. Thus where a suit by a mortgagee is in effect one for a declaration that a sale by his mortgagor to a third party is null and void Article 120 applies to the case and not

Article 91—*Misan v. Shree Ba* 1 Bur L J 106 A I R 1923 Rang 8
 A land belonging to defendant no 1 was mortgaged by him to defendant no 5 and afterwards the plaintiff purchased it at a sale in execution of a certain decree against defendant no 1 the plaintiff thereupon brought a suit for a declaration that the mortgage was fraudulent and without consideration. *Held* that the suit does not fall under this Article. No doubt a declaration that defendant no 5 has no title to the land would be to that extent equivalent to setting aside that mortgage but such declaration would still leave the deed to operate as between the parties thereto and therefore would not amount to cancelling the deed. Moreover the plaintiff has no title or interest to set aside the deed as *between the parties* thereto.—*Pachamuthu v. Chinnappa* 10 Mad 213 (215) *Unni v. Lunkhi* 14 Mad 26 *Uma Shankar v. Halka Prasad* 6 All 75. A suit by a reversioner to obtain a declaration that a *kanom* executed by the widow in favour of the defendant is not binding on the estate or on the plaintiff is not governed by this Article as the plaintiff was not a party to the deed.—*Puraken v. Parvati* 16 Mad 138 (following *Pachamuthu v. Chinnappa* 10 Mad 213) The mortgagor in contravention of the terms of the mortgage granted a perpetual lease of the mortgaged property and the mortgagee brought a suit upon the mortgage and in execution of a decree brought the mortgaged property to sale which was purchased by the plaintiff. The plaintiff on becoming aware of the perpetual lease sued for its cancellation and for a declaration that the defendant (lessee) had no right to interfere with or obstruct the plaintiff in respect of the property in question. *Held* that Art 91 did not apply but Art 120 the prayer for the cancelment of the deed could be treated as merely incidental to the main relief (declaration) asked. What the plaintiff wants is a declaration that the shadow cast upon his title may be dispersed. It is otherwise nothing to him whether the lease between the mortgagor and the defendant is or is not binding upon those who were parties to it.—*Muhammad Bazar v. Mango Mal* 22 All 90 (93)

Will.—This Article does not apply to a suit to set aside a will.—*Sajid Ali v. Ibad Ali* 23 Cal 1 (at p 10) P C

421 Where Article applies.—Article 91 applies to those cases where the prayer for cancellation of the instrument is an essential part of the relief claimed; i.e. where it is necessary for the plaintiff to set aside the instrument before he can obtain the other relief claimed by him.—*Amir v. Mussammatinissa* 75 P R 1896. This Article can apply to suits in which the documents sought to be set aside were intended to be operative against the plaintiff and would remain operative or would defeat his suit to recover possession of any property if they are not set aside.—*Sham Lal v. Amarendra* 23 Cal 460 (466) *Jan Mahomed v. Datu Jafar*, 38 Bom 449 Arts 91 and 92 are particularly concerned with instruments which if allowed to stand unchallenged once they become known might become important

evidence against the persons whose rights they purported to affect—*Raghubar v Bhikya* 12 Cal 69 (74)

Thus where a deed of relinquishment which operates to put an end to the plaintiff's right to certain property is not void *ab initio* but is a valid document and binding on the plaintiff until it is set aside the plaintiff's right to recover the property will be barred if he fails to bring a suit to set aside the deed within the time prescribed by this Article—*Rameshwar Prosad v Lachmi Prosad* 31 Cal 111 Where a sale becomes voidable by subsequent failure of consideration the title nevertheless passes to the purchaser by such sale and the vendor or other persons claiming to recover the property must get the sale avoided within the period prescribed by this Article before they can recover possession—*Govindasami v Ramaswamy* 32 Mad 77 When in a suit for possession of immoveable property it is necessary that a lease-deed executed by the plaintiff's predecessor must be first set aside before possession can be claimed the suit must be governed by this Article—*Raja Rajeswara v Arunachellam* 38 Mad 321 Where a sale deed is executed by the plaintiff or his predecessor in title and consideration (though inadequate) passes and the nature of the transaction shows that it is not void but voidable only the suit is governed by Article 91 even though the plaintiff sues for possession—*Janki Kunwar v Ajit Singh* 15 Cal 38 (P C) A Mohammedan executed a deed of gift of his property under which possession was taken by the donee. The donor during his life time never took any steps to have the deed set aside. A suit was brought by his heir claiming a share in the donor's estate by right of inheritance and by having it declared that the deed was procured from the donor by fraud and undue influence. It was held that the cancellation of the deed was a substantial and necessary incident of the claim and the suit fell under this Article notwithstanding that the plaintiff chose to call the suit one for possession—*Hasan Ali v Naro* 11 All 456 A suit by the reversioners to set aside an *ikrarnama* executed by the last male owner (and which is binding on the reversioners) is governed by Art 91 and not by Art 144 even though the prayer in the suit is for recovery of possession of the property comprised in the *ikrarnama*—*Mahabir v Harishur* 19 Cal 629 Where a Hindu father executes a sale-deed under undue influence and has not avoided it within the time fixed by this Article his sons cannot recover the property—*Narogopal v Paragowda* 41 Bom 347 *Palaraeswara v Kuppuswami* 41 M L J 474 Where a person is *prima facie* bound by a decree he cannot by using ostensibly for possession ignore the decree and evade the operation of law and where such a decree is an impediment to the plaintiff's way in obtaining a relief inconsistent with it he must bring his suit within the period prescribed by law for setting aside a decree—*Harendra v Rameshwar Singh* 4 Pat 310 6 P L T 634 A I R 1925 Pat 623 (per Das J) Where the

cancellation of an instrument is the *substantial* relief sought and the recovery of the property is only an incidental or auxiliary relief thereto the suit falls under this Article—*Rampal v Balbhaddar* 25 All 1 (P C)

In some cases the broad proposition has been laid down that Art 91 is intended to apply to suits of the kind mentioned in sec 39 of the Specific Relief Act and to cases where the plaintiff seeks to cancel or set aside an instrument which he has been induced by misrepresentation concealment of facts or other means of like kind to enter into or where the cancellation or setting aside of an instrument is the only relief prayed for—*Harari v Jadam* 5 All 76 *Sabha v Sahodra* 5 All 122 *Uma Shankar v Kalka* 6 All 75 *Bahatram v Kharselys* 27 Bom 560 *Safdar v Akbar* 5 Ind Cas 497

422 Starting point of limitation —The words when the facts entitling the plaintiff to have the instrument cancelled or set aside became known to him must be construed to mean when having knowledge of such facts a cause of action has accrued to him and he is in a position to maintain a suit In this case the defendant had on the 1st December 1875 transferred certain property subject to attachment before judgment in a suit which both the lower Courts dismissed but which the High Court decreed in favour of the plaintiff on the 7th August 1876 The present suit for cancellation of the transfer was brought more than three years after the plaintiff knew of the transfer but within three years from the date of the decree of the High Court Held that the suit was within time as the plaintiff's cause of action arose on the date of the High Court's decree—*Tawangir v Kura Mal* 3 All 394

Where the plaintiff and his guardian were perfectly aware of the facts entitling them to set aside an award the plaintiff must prove that he attained majority within three years before the suit Limitation ran from the date of the award and not from the date when the Court refused to file it—*Kirkwood v Maung Sin* A I R 1915 P C 216 89 Ind Cas 773 (P C)

In a suit to set aside a deed executed by the plaintiff himself on the ground of undue influence and fraud the facts relied upon by the plaintiff (i.e. undue influence etc) were known to him from the date of the instrument therefore limitation would begin to run from that date—*Janki v Ajit Singh* 15 Cal 58 (P C) If however the undue influence continues to be exercised after the execution of the instrument limitation runs only when the influence ceases and the plaintiff may be said to have full knowledge of all the matters—*Rajeswara v Rajagopala* 1917 M W N 906

Under the Mahomedan Law a gift becomes operative only after delivery of possession therefore the cause of action for a suit to set aside a gift arises not on the execution of the deed of gift but from the moment when

by delivery of possession it becomes operative in law—*Meda Bibi v Imaman*, 6 All 207 (210)

Where the plaintiff executed a sham sale deed in favour of his sons and they began to set up a title under the deed, the cause of action for a suit for cancellation of the deed would arise not from the date of the sale deed but from the date the plaintiff apprehended injury to his interest *i.e.*, the date when the defendants began to set up a title under the deed—*Singarrappa v Talari*, 28 Mad 349 In a suit by the mortgagor against the dispossessing mortgagee for cancellation of the mortgagor-deed and for possession on the ground that the mortgage was sham, limitation runs from the date of the dispossession and not from the date of the mortgage-bond—*Vishal v Hari*, 25 Bom 78 But in an Allahabad case, where the plaintiff brought a suit to set aside a sham mortgage-deed on the ground that the defendant recently threatened to bring a suit on the basis of it, though when it was executed it was never intended to be acted upon, it was held that limitation ran from the date of the execution of the mortgage deed and not from the date when the defendant threatened to sue upon it, in as much as the facts entitling the plaintiff to have the document set aside were known to the plaintiff from the very outset—*Qasim v Muhammad* 37 All 640 (dissenting from 28 Mad 349 and 25 Bom 78 cited above) Where the plaintiff executed a registered deed of adoption in which he declared that he had adopted a certain boy and had conveyed to him a certain property and afterwards brought a suit for a declaration that the adoption-deed was void and of no effect as against the plaintiff, held that the suit was governed by either Article 91 or 118 and that limitation ran from the date of the execution of the adoption-deed, because the fact that no adoption had ever taken place was perfectly well known to the plaintiff on the very date on which he put his signature to the adoption deed and caused it to be registered—*Udit Narain v Randhir Singh* 45 All 169 (176) 69 Ind Cas 971

A suit by a reversioner to set aside an instrument executed by the last male owner must be brought within three years from the date of the death of the widow—*Mahabir v Hurrikur*, 19 Cal 629

A suit to set aside an instrument executed during the minority of the plaintiff, must be brought within three years after the minor plaintiff has attained majority—*Channurappa v Danava*, 19 Bom 593. *Aulyas v Bispro*, 6 W R 321

Burden of proof—In a suit under this Article, if the defendant pleads that the cause of action for the plaintiff's suit to cancel the deed arose earlier than the period alleged by the plaintiff, the burden lies on the defendant to prove that the plaintiff acquired full information of the true state of facts at a time too remote to allow him to maintain the suit—*Nisaran v Nirupama*, 34 C L J 563

423. **Effect of Limitation**—Where a sale is voidable for fraud, and

no suit is brought to set aside the sale within the period prescribed by this Article the right to recover the property is also barred—*Gobindasamy v Ramasamy* 32 Mad 72

But though a party's remedy as plaintiff to have the instrument set aside may be barred it is competent to him to say by way of equitable defence if sued that the instrument ought not to be enforced—*Lakshmi v Roop Lal* 30 Mad 169

92—To declare the for gery of an instrument issued or registered	Three years	When the issue or regis- tration becomes known to the plaintiff
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424 Application of Article —Arts 91 to 93 apply to suits brought expressly to cancel set aside or declare the forgery of an instrument but where some substantial relief (*e g* possession of property) is sought and the cancellation or declaration is subservient or merely ancillary and not necessary to the granting of such relief these Articles do not apply—*Abdul Rahim v Kirparam* 16 Bom 186 (189) Thus a suit by the plaintiff for possession and to set as de on the ground of forgery a deed of sale alleged to have been executed by his father in favour of the defendant is governed by Art 144 and not by Article 92 or 93—*Trilochan v Labakishore* 2 C L R 10

425 Issued —An *anumatipatra* (deed of permission to adopt) was given to a widow by her husband who died in 1882 She first adopted in 1884 a boy who soon after died She then in 1887 adopted another boy and the reversionary heirs brought this suit in 1888 to have the adoption set aside It was contended by the defendant that the suit was to declare the forgery of the *anumatipatra* which was issued when the adoption of 1884 was effected with full publicity and the suit brought more than three years after that date was barred by this Article It was held that the word issued was intended to refer to the kinds of documents to which people commonly apply that term in business and that an *anumatipatra* could not be said to be issued when an adoption was made under it therefore this Article did not apply to the suit Article 93 also did not apply because it was very difficult to say that an adoption followed by nothing more was in any sense an enforcement of power against other persons within the meaning of that Article Art 118 applied to the suit which was therefore brought in good time—*Hurri Bhushan v Upendra Lal* 24 Cal 1 (P C)

A suit to declare an unregistered will as forged and beyond the power of the testator to make is governed by Art 120 Art 92 does not apply to the case as the will is neither issued nor registered—*Gauhar v Ghulam*, 1909 P L R 82

by delivery of possession it becomes operative in law—*Meda Bibi v Imaman* 6 All 207 (210)

Where the plaintiff executed a sham sale-deed in favour of his sons and they began to set up a title under the deed the cause of action for a suit for cancellation of the deed would arise not from the date of the sale deed but from the date the plaintiff apprehended injury to his interest i.e. the date when the defendants began to set up a title under the deed—*Singarrappa v Talari* 28 Mad 349 In a suit by the mortgagor against the dispossessing mortgagee for cancellation of the mortgagor-deed and for possession on the ground that the mortgage was sham limitation runs from the date of the dispossession and not from the date of the mortgage-bond—*Vithal v Hari* 25 Bom 78 But in an Allahabad case where the plaintiff brought a suit to set aside a sham mortgage-deed on the ground that the defendant recently threatened to bring a suit on the basis of it, though when it was executed it was never intended to be acted upon it was held that limitation ran from the date of the execution of the mortgage deed and not from the date when the defendant threatened to sue upon it in as much as the facts entitling the plaintiff to have the document set aside were known to the plaintiff from the very outset—*Qasim v Muham* mad 37 All 640 (dissenting from 28 Mad 349 and 25 Bom 78 cited above) Where the plaintiff executed a registered deed of adoption in which he declared that he had adopted a certain boy and had conveyed to him a certain property and afterwards brought a suit for a declaration that the adoption deed was void and of no effect as against the plaintiff held that the suit was governed by either Article 91 or 118 and that limitation ran from the date of the execution of the adoption-deed because the fact that no adoption had ever taken place was perfectly well known to the plaintiff on the very date on which he put his signature to the adoption deed and caused it to be registered—*Udit Narain v Randhir Singh* 43 All 169 (176) 69 Ind Cas 971

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Burden of proof—In a suit under this Article if the defendant pleads that the cause of action for the plaintiff's suit to cancel the deed arose earlier than the period alleged by the plaintiff the burden lies on the defendant to prove that the plaintiff acquired full information of the true state of facts at a time too remote to allow him to maintain the suit—*Nisaran v Nirupama* 34 C L J 563

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A suit to declare an unregistered will as forged and beyond the power of the testator to make is governed by Art 120 Art 92 does not apply to the case as the will is neither issued nor registered—*Gauhar v. Ghulam*, 1909 P L R 82

by delivery of possession it becomes operative in law—*Meda Bibi v Imaman*, 6 All 207 (210)

Where the plaintiff executed a sham sale deed in favour of his sons, and they began to set up a title under the deed, the cause of action for a suit for cancellation of the deed would arise not from the date of the sale deed but from the date the plaintiff apprehended injury to his interest *ie*, the date when the defendants began to set up a title under the deed—*Singarrappa v Talari* 28 Mad 349 In a suit by the mortgagor against the dispossessing mortgagee for cancellation of the mortgagor-deed and for possession, on the ground that the mortgage was sham, limitation runs from the date of the dispossession and not from the date of the mortgage-bond—*Vithal v Hari*, 25 Bom 78 But in an Allahabad case, where the plaintiff brought a suit to set aside a sham mortgage-deed on the ground that the defendant recently threatened to bring a suit on the basis of it though when it was executed it was never intended to be acted upon, it was held that limitation ran from the date of the execution of the mortgage deed, and not from the date when the defendant threatened to sue upon it, in as much as the facts entitling the plaintiff to have the document set aside were known to the plaintiff from the very outset—*Qasim v Muhammad* 37 All 640 (dissenting from 28 Mad 349 and 25 Bom 78 cited above) Where the plaintiff executed a registered deed of adoption in which he declared that he had adopted a certain boy and had conveyed to him a certain property and afterwards brought a suit for a declaration that the adoption-deed was void and of no effect as against the plaintiff held that the suit was governed by either Article 91 or 118 and that limitation ran from the date of the execution of the adoption-deed because the fact that no adoption had ever taken place was perfectly well known to the plaintiff on the very date on which he put his signature to the adoption deed and caused it to be registered—*Udit Narain v Randhir Singh* 45 All 169 (176) 69 Ind Cas 971

A suit by a reversioner to set aside an instrument executed by the last male owner must be brought within three years from the date of the death of the widow—*Mahabir v Hurrishur*, 19 Cal 629

A suit to set aside an instrument executed during the minority of the plaintiff must be brought within three years after the minor plaintiff has attained majority—*Chanvirapa v Danava* 19 Bom 593, *Kulyan v Bispro*, 6 W R 321

Burden of proof—In a suit under this Article, if the defendant pleads that the cause of action for the plaintiff's suit to cancel the deed arose earlier than the period alleged by the plaintiff, the burden lies on the defendant to prove that the plaintiff acquired full information of the true state of facts at a time too remote to allow him to maintain the suit—*Nisaran v Nirupama*, 34 C L J 563

423 Effect of Limitation.—Where a sale is voidable for fraud, and

no suit is brought to set aside the sale within the period prescribed by this Article the right to recover the property is also barred—*Gobindasamy v Ramasamy* 32 Mad 72

But though a party's remedy as *plaintiff* to have the instrument set aside may be barred it is competent to him to say by way of equitable *defence* if sued, that the instrument ought not to be enforced—*Lakshmi v. Roop Lal*, 30 Mad 169

92—To declare the for-	Three	When the issue or regis-
gery of an instrument	years	tration becomes known
issued or registered		to the plaintiff

424 Application of Article —Arts 91 to 93 apply to suits brought expressly to cancel, set aside or declare the forgery of an instrument, but where some substantial relief (*e g* possession of property) is sought and the cancellation or declaration is subservient or merely ancillary and not necessary to the granting of such relief these Articles do not apply—*Abdul Rahim v Kirparam*, 16 Bom 186 (189) Thus, a suit by the plaintiff for possession and to set aside on the ground of forgery a deed of sale alleged to have been executed by his father in favour of the defendant is governed by Art 144 and not by Article 92 or 93—*Trilochan v Nobakishore*, 2 C L R 10

425. 'Issued' —An *anumatipatra* (deed of permission to adopt) was given to a widow by her husband who died in 1882 She first adopted in 1884 a boy who soon after died She then in 1887 adopted another boy, and the reversionary heirs brought this suit, in 1888, to have the adoption set aside It was contended by the defendant that the suit was to declare the forgery of the *anumatipatra* which was issued when the adoption of 1884 was effected with full publicity, and the suit brought more than three years after that date was barred by this Article It was held that the word *issued* was intended to refer to the kinds of documents to which people commonly apply that term in business and that an *anumatipatra* could not be said to be 'issued' when an adoption was made under it, therefore this Article did not apply to the suit Article 93 also did not apply because it was very difficult to say that an adoption followed by nothing more was in any sense an *enforcement* of power against other persons within the meaning of that Article Art 118 applied to the suit which was therefore brought in good time—*Hurri Bhushan v. Upendra Lal*, 24 Cal 1 (P C).

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92—To declare the forgery of an instrument issued or registered	Three years	When the issue or registration becomes known to the plaintiff
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93 —To declare the for- Three The date of the attempt.
 gery of an instrument years.
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 plaintiff.

426 Application of Article —This Article applies to suits brought expressly to declare the forgery of an instrument. Where the declaration is an ancillary relief, and only incidental to a substantial relief claimed, this Article will not apply—*Abdul Rahim v Kirparam*, 16 Bom 186 (189) For instance, where the suit is one for possession, and the plaintiff avers that the sale deed relied on by the defendant is a forgery, this Article would not apply—*Narayanan v Kannammal*, 28 Mad 338 Or, where the suit is for declaration of plaintiff's title to a certain property, and to set aside a will which the plaintiff alleges to be a forgery, the suit is not governed by the three years' rule under this Article—*Nistaram v Anundomoyi* 2 C L R 361 See also *Trilochan v Nabokishore* 2 C L R 10, cited under Art 92

427 Attempt to enforce —An attempt to recover rent under a forged lease is an attempt to enforce it but an attempt to have the lease recorded under the Bombay Record of Rights Act (IV of 1903) is not such an attempt—*Achyut v Gopal* 40 Bom 22 (27) Similarly, an attempt to register a document is not an attempt to enforce it—*Ibid*

An adoption by the widow by virtue of an *anumatipatra* (deed of authority to adopt) cannot be said to be an enforcement of the *anumatipatra* against the reversionary heirs—*Hurri Bhushan v Upendra*, 21 Cal 1 (P C) cited under Art 92

An attempt to register a document is not an attempt to enforce it against any person's rights—*Kamalanadhan v Sathiraju*, 32 Ind Cas 99 (Mad) In this case, a widow applied under the Succession Certificate Act for a certificate to enable her to collect the debts due to her deceased husband, stating in her petition that her husband left no heirs nearer to herself, and she based her claim to the certificate expressly on the ground that she was her husband's widow and as such entitled to the certificate under the Hindu law In the petition she made mention of a will and stated that under it she was the legatee of her deceased husband but nowhere did she base her right to collect the debts upon her position as legatee. In a subsequent suit by the reversioners of her husband to declare that the will was a forgery, it was held that the mere mention of the will in a superfluous paragraph of the application for succession certificate was not an attempt on the part of the widow to enforce the will against the reversioners. The suit therefore did not fall under this Article—*Ibid*

So also, the mere mention of a will in a written statement filed by the

93—To declare the forgery of an instrument attempted to be enforced against the plaintiff. Three years. The date of the attempt.

426 Application of Article —This Article applies to suits brought expressly to declare the forgery of an instrument Where the declaration is an ancillary relief and only incidental to a substantial relief claimed, this Article will not apply—*Abdul Rahim v Kirparam* 16 Bom 186 (189) For instance, where the suit is one for possession, and the plaintiff avers that the sale-deed relied on by the defendant is a forgery, this Article would not apply—*Narayanan v Kannammal*, 28 Mad 338 Or, where the suit is for declaration of plaintiff's title to a certain property and to set aside a will which the plaintiff alleges to be a forgery, the suit is not governed by the three years rule under this Article—*Nistars v Anundomoyi* 2 C L R 561 See also *Trilochan v Nabokishore* 2 C L R 10, cited under Art 92

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ground of fraud is merely *ancillary* to some main relief as for instance where the main relief is the declaration of the plaintiff's title to the property but there is also a prayer in the plaint for a declaration of a deed as fraudulent and void against the plaintiff—*Burjorji v Dhunbai* 16 Bom 1 *Saral v Kanai Lal* 26 C W N 479 or where the auction purchaser brings a suit for possession of immoveable property against the mortgagee from the judgment-debtor after avoidance of the mortgage as being fraudulent fictitious and void as against the plaintiff—*Uma Shankar v Kalka* 6 All 75

Again this Article does not apply unless the plaintiff was a party to the decree or to the transaction in which the fraud was committed. Therefore where a fraudulent decree is passed against a person in possession with a limited interest a suit by the reversionary heir for a declaration that the decree is void is not governed by this Article but by Art 120 in as much as he was not a party to the decree—*Tallapragada v Booriga palli* 30 Mad 402 similarly this Article is inapplicable to a suit brought by the real owner for possession of immoveable property and for setting aside a sale held in execution of a fraudulent decree passed against the *benadidar* because the real owner not being a party to the decree in which the fraud was practised was in no way affected thereby and it is not necessary for him to have the sale set aside—*Annads v Prosiannamoyi* 34 Cal 711 (P C)

If fraud is not proved the suit does not fall under this Article—*Thannman Singh v Dachand* 9 O L J 171 A I R 1922 Oudh 113 67 Ind Cas 395

430 Suits under this Article —

Suit to set aside fraudulent sale —If a sale is sought to be set aside on the ground of fraud Art 95 and not Art 12 applies—*Sham ali v Ali nony* 34 Cal 41 *Saroda v Rai Mohan* 85 Ind Cas 629 (Cal) *Nalha Singh v Jodha Singh* 6 All 406 *Sree Raja v Goluguri* 34 Mad 143 (150) *Ambikanoni v Aheltra* 30 C W N 59 Thus the plaintiff sought to set aside a sale in execution of a decree and to obtain a declaration that he was not bound by such decree which the plaintiff alleged to be fraudulent and collusive. It was held that Art 95 and not Art 12 applied—*Parekh v Bai Bhakat* 11 Bom 119 *Moti Lal v Russich* 26 Cal 326 (Note) Where plaintiff's land was sold by the Revenue authorities for default of payment of assessment due upon it a suit by the plaintiff to set aside the sale on the ground that the sale was brought about by the fraud practised by the *inamdar* would be governed by this Article—*Bajaj v Firchand* 13 Bom 221

Suit for compensation money —Where the compensation for acquisition of land was awarded to a wrong person through fraud or mistake a suit by the real owner would fall under this Article—*Varadachari v Arishnasami* 6 Mad 344

Suit against fraudulent decreeholder by purchaser —Where the holder of a decree under Regulation VII of 1799 sold his rights in the decree, and after substituting the purchaser's name for his own as decree holder fraudulently realised from the judgment-debtor monies under that decree, a suit by the purchaser against the decree holder for recovery of the monies thus fraudulently realised will be governed by this Article—*Gopal v Purnoo* 10 W R 104

A suit by the auction purchaser for refund of purchase money on the ground that the property was encumbered and the existence of incumbrance was concealed from him by the decree holder is a suit for damages on the ground of fraud under this Article. It cannot be treated as a suit for recovery of purchase money on the ground of failure of consideration under Art 97—*Balasubramanya v Maruthamalai* 16 Ind Cas 215

Suit to set aside partition —A suit by a minor after attaining majority to set aside a deed of partition on the ground of fraud is governed by this Article or Art 91 and must be brought within three years after the minor plaintiff has attained majority—*Channirapa v Donava* 19 Bom 393. If however there be no allegation of fraud or mistake but only an allotment of less than his share to the minor a suit by the minor on attaining majority to recover his full share will not be governed by the three years rule of limitation under this Article—*Lal Bahadur v Sispal* 14 All 498

Suit under Madras Revenue Recovery Act —A suit simply to set aside a sale for arrears of revenue held under the Madras Revenue Recovery Act (II of 1864) on the ground of fraud is governed by the six months limitation specially provided by sec 59 of that Act and not by this Article—*Venkata v Chingadu* 12 Mad 168 (F B) *Iswara v Karuppan* 3 M L J 255. But where the suit is to set aside the sale on the ground of fraud as well as to recover possession from the purchaser it will be governed by this Article because the Revenue Recovery Act applies to a suit merely for setting aside a sale and not for any other relief claimed—*Venkatapathi v Subramana* 9 Mad 457 *Kubbusami v Subramania* 7 M L J 73

Suit to set aside compromise decree —A suit to set aside a compromise decree on the ground of fraud is governed by this Article—*Muhamad Buksh v Mahomed Ali* 5 All 204, *Mohendra v Gour* 22 C W N 861, *Mahomed Jan v Commissioner* 37 Ind Cas 797 (Pat)

Suit for damages for fraud —Such a suit falls under this Article. The words "other relief" mentioned in Art 95 do not mean relief of the same kind as the setting aside of a decree but is comprehensive enough to include suits for compensation for damage caused to the plaintiff by defendant's fraud—*Bank of Madras v Multan Chand* 27 Mad 343 followed in *Punnayil v Raman* 31 Mad 230 (fully cited in Note 439 under Art 97)

431 *Knowledge of fraud* —So long as a person upon whom fraud has been practised remains in ignorance of it no time will run against

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If fraud is not proved, the suit does not fall under this Article—*Thamman Singh v. Dalchand*, 9 O L J 171, A I R 1922 Oudh 113, 67 Ind. Cas 595

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Suit to set aside fraudulent sale —If a sale is sought to be set aside on the ground of fraud, Art 95 and not Art 12, applies—*Sham'at v. Nilmony*, 34 Cal 241, *Saroda v. Rai Mohan*, 85 Ind Cas 629 (Cal); *Natha Singh v. Jodha Singh*, 6 All 406; *Sree Raja v. Goluguri*, 34 Mad. 143 (150); *Ambikamoni v. Khutira* 30 C W N 59 Thus, the plaintiff sought to set aside a sale in execution of a decree, and to obtain a declaration that he was not bound by such decree, which the plaintiff alleged to be fraudulent and collusive. It was held that Art 95, and not Art. 12, applied—*Parth v. Bat Bhahat*, 11 Bom 119, *Moh Lal v. Russich*, 26 Cal 325 (Note) Where plaintiff's land was sold by the Revenue authorities for default of payment of assessment due upon it, a suit by the plaintiff to set aside the sale on the ground that the sale was brought about by the fraud practised by the inamdar, would be governed by this Article—*Daya v. Pirchand*, 13 Bom 221

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431. Knowledge of fraud —So long as a person upon whom fraud has been practised remains in ignorance of it no time will run

him, but when he has acquired knowledge of such fraud he must, within three years from the date of obtaining such knowledge, come into Court for relief—*Muhammad Baksh v Mahomed Ali*, 5 All 294

The knowledge predicated by the terms of this Article is not mere suspicion but such definite knowledge as enables the person defrauded to seek his remedy in Court—*Natha Singh v Jodha Singh*, 6 All 406, *Indra v Raula* 3 Ind Cas 316

The defendant setting up the defence of limitation must shew that the plaintiff had clear and definite knowledge of the facts which constitute the fraud at a time which is too remote to allow him to bring the suit. The mere fact that some hint and clues reached the plaintiff which if vigorously and acutely followed up might have led to a complete knowledge of the fraud is not enough to constitute clear and definite knowledge of it—*Rahimkhoy v Turner* 17 Bom 341 (P C), affirming 14 Bom 408

When it is doubtful at what precise time the fraud became known to the plaintiff the onus is on the defendant to shew that the suit is out of time—*Punnayil v Kamas* 31 Mad 230 (233)

432 Effect of bar of limitation —Although a person may be debarred by lapse of time from bringing a suit as plaintiff for setting aside a decree obtained by fraud still he can as a defendant in an action in which such decree is used against him shew that it was obtained by fraud—*Rajib Panda v Lakhani* 7 Cal 11 (23)

96 —For relief on the Three When the mistake becomes known to the plaintiff
ground of mistake years

433 Cases —A suit to recover money alleged to have been paid by the plaintiffs to the defendants in excess of the sum actually payable is governed by this Article rather than Article 62—*Tofa Lal v Syed Moideen* 4 Pat 448, A I R 1925 Pat 765 93 Ind Cas 129 *Malhuram v Debendranath* 12 Cal 533 Thus, the defendants who purchased some bales of articles from another sold the same to the plaintiff and afterwards it was found that some of the bales did not contain the stipulated number of pieces. The plaintiff thereupon sued the defendants for the price of the pieces short delivered &c for refund of the excess price paid. Held that the suit fell under this Article not under Art 62, and limitation ran from the date of knowledge of short delivery—*Ramiah v Sadashiv Mudaliar*, 48 Mad 925 49 M L J 228 A. I R 1925 Mad 1255

A suit for amendment or rectification of a lease on the footing of a common mistake of the lessor and the lessee under which some land was wrongly included in the lease, is governed by this Article—*Bijoy Chand Mahatab v. Secretary of State* 48 Ind Cas 972 (Cal)

A suit for possession of immoveable property when relief is claimed on the ground of mistake, falls under Article 96 and not Art 144 and it is

immaterial whether the mistake was made by the plaintiff or by a third party—*Sultan Mahomed v Ahm Khan* 1905 P L R 3

Where compensation for acquisition of land was awarded by mistake to a person who was not entitled to it a suit by the real owner to recover the money falls under this Article—*Israraghata v Krishnasami* 6 Mad 344 The mistake contemplated by this Article may be that of the plaintiff or of a third party through which the plaintiff's rights have been affected—*Ibid* (at p 350)

A suit by a creditor for setting aside a discharge made by him on the ground of mistake is governed by this Article—*Madras C S & S Factories v William Shou* 14 M L J 443

The plaintiff mortgaged seven out of his eight properties but by a mistake made by the plaintiff in the bond all the eight properties were sold under a decree on the mortgage and purchased by the defendant. The plaintiff now brought a suit to recover from the defendant the value of the eighth property which was not the subject of the mortgage. *Held* that since the plaintiff was solely responsible for the mistake, he cannot treat the sale as a nullity and ignore it. It is necessary for him to get the sale set aside before he is entitled to any relief on the ground of mistake. The suit therefore falls under Article 12 and not under this Article—*Nagabhalla v Nagappa* 46 Bom 914

A suit for refund of advance paid under a void agreement (viz. an agreement to transfer a non transferable property) falls under this Article and the period of three years is to be counted from the date when the agreement is discovered to be void which in this case is the date of the agreement, because when the agreement is one forbidden by law the plaintiff must be deemed to have been aware of the fact when he entered into it. The period of limitation may also be counted from the date when the contract was declared to be void in a previous suit between the parties because it was suggested in this case that the plaintiff was unaware of the illegality of the agreement until the Court gave its decision in that suit—*Aurayprabhakara v Gummuadu Sanyasi*, 48 M L J 598, 88 Ind Cas 557, A I R 1925 Mad 885

A Hindu, while next reversioner to an Oudh estate purported to sell half the estate, declaring by the sale deed that when he succeeded to the estate on the death of the widow he would put the vendee in proprietary possession. After the death of the widow, the purchaser sued the vendor for possession or alternatively to recover the purchase money with interest. *Held* that the claim for possession could not be granted as there was no effectual transfer of the estate, which was only an expectancy at the time of the sale. That the vendee was entitled only to recover the purchase money, and that the period of limitation for the claim to recover the purchase money ran from the date when the misapprehension of the vendor as to his right to sell the estate was discovered by the plaintiff, which was

not earlier than the time at which his demand for possession was resisted *ie*, the time when the sale was declared to be void in this suit—*Harnath v Indar Bahadur*, 45 All 179 184 (P C)

Suit to set aside decree—This Article is intended to apply to those cases in which the Courts are asked to relieve parties from the consequences of mistakes committed by them in the course of *contractual* relations. The Article does not refer to a suit to set aside a *decree* on the ground of mistake made by the plaintiff. Such a suit is not at all maintainable—*Ramzan Khan v Yakub Khan* 11 Ind Cas 537 (Oudh). This Article is so general in its character that it can hardly be said that it affords any authority for holding that a suit to set aside a decree on the ground of mistake is maintainable. The mistake can be rectified by proceeding under sec 108 C P Code (1882) or by way of appeal or review—*Chand Meen v Asima Bahu* 10 C W N 1024 (1025 1026)

While Article 95 refers to a suit for setting aside a *decree* on the ground of fraud, the words used in Article 96 refer to relief on the ground of mistake. It does not refer to a suit to set aside a *decree* on the ground of mistake and obviously refers to a suit for relief on the ground of mistake not made in a decree—*Jogeshwar v Ganga Bisahu* 8 C W N 473 (475)

434 Limitation. Time runs when the mistake is known to the plaintiff. Thus on a partition of family properties between the plaintiff and the defendant the former got certain properties including a mortgage debt due to the family. The money due on the mortgage had been long ago paid off by the mortgagor but both the plaintiff and the defendant were under a mutual mistake that the money was still due. The plaintiff brought a suit against the mortgagor and it was as a matter of course dismissed in 1912 and the order of dismissal was confirmed by the High Court on appeal in July 1914. In June 1917 the plaintiff brought the present suit against the defendant to recover from him the share of the mortgage money. *Held* that as there was a mutual mistake there was no fraud that the suit fell under Article 96 and that the suit was barred under this Article as time ran from the date of the dismissal of the previous suit against the mortgagor in 1912 when the plaintiff was aware of the mistake and not from the date of the High Court's order in 1914—*Marland v Dhondo* 45 Bom 581 (589)

97—For money paid upon Three The date of the failure
an existing considera- years
tion which afterwards
fails

435 Articles 62 and 97—It seems that many of the cases governed by this Article would also fall under Article 62. But there is a distinction

between the two Articles and it is this where the transaction is void *ab initio* there cannot be any existing consideration which afterwards fails within the meaning of this Article but the consideration fails *ab initio* in such a case the suit for refund of money would fall under Article 62 and not under this Article. But where the transaction is not void *ab initio* but voidable only and the consideration fails by reason of some subsequent event the suit would more properly fall under the present Article than under Article 62. This principle ought to be borne in mind in considering whether the case falls under Article 62 or 97 and this distinction has been clearly pointed out in the cases cited under Art. 62 under heading Suit for refund of consideration money.

The leading authority on this subject is the decision of the Privy Council in *Hannu Jan v. Haiman* 19 Cal 123. In this case the manager of a joint Hindu family governed by the Mithila law sold a portion of the joint family property but on objection made by the other members of the family to the transfer when the purchaser attempted to take possession the sale was set aside. The purchaser then brought a suit for refund of the purchase money. Their Lordships of the Judicial Committee while expressing the view that the suit must fall either under Article 62 or Article 97 went on to observe. If there *never was any consideration* then the price paid by the appellant (purchaser) was money had and received to his account by Dowlat Mandur (vendor). But their Lordships are inclined to think that the sale was not necessarily void but was only voidable if objection were taken to it by the other members of the joint family. If so the *consideration did not fail at once* but only from the time when the appellant endeavoured to obtain possession of the property and being opposed found himself unable to obtain possession. There was then at all events a failure of consideration and he would have had a right to sue at that time to recover back his purchase money upon a failure of consideration and therefore the case appears to them to be within the enactments of Article 97.

Even though a mortgage be void still if a mortgagee gets possession it should be held that he has an existing consideration for his mortgage and it would fail when the mortgagee is finally dispossessed. The suit for recovery of the money falls under this Article—*Ram Harek v. Sahib Ram*, 89 Ind Cas 332 A I R 1926 Oudh 19.

436 Suit for refund of money upon failure to obtain possession or upon subsequent dispossession.—Where the purchaser fails to obtain possession of the property purchased or obtains possession but is subsequently dispossessed by reason of a defect of title in the vendor a suit for refund of the purchase money is governed by this Article and not by Article 62—*Tulsiram v. Murdhkar* 26 Bom 750 *Narsing v. Pachu* 37 Bom 538 *Subbaraya v. Rajagopala* 38 Mad 887 *Venkatanarasimhaiah v. Peramma* 18 Mad 173 *Ranchandra v. Tahfah Bhatti* 26 All

Munni Babu v Hanwar Kamla Singh 45 All 378 See these cases fully cited under Article 62 under heading Suit for refund of consideration money

But it has been held in several cases of the Madras High Court that after the passing of the Transfer of Property Act (1882) a covenant of title and quiet enjoyment must be implied in every contract of sale under sec 55 of that Act and therefore a suit by the purchaser for refund of purchase money on account of failure to get possession is to be deemed as a suit for compensation for breach of contract in writing registered (if there is a registered sale deed) and is therefore governed by Article 116—*Arunachala v Ramasami* 38 Mad 1171 *Kasturi Naicken v Venkata subba* 1 M L J 162 *Narayana v Pida Rasia* 1 M L J 479 *Chidambaram v Sathasamy* 15 M L J 396 *Vageswara v Simoasiva* (1911) 1 M W N 361 *Krishnan v Kannan* 21 Mad 8 This view is also taken by the Bombay High Court in *Multan Wal v Budhimal* 45 Bom 955 (960) So also where under a registered usufructuary mortgage the mortgagor failed to secure the mortgagee in possession whereupon the latter brought a suit for refund of the mortgage money it was held that the mortgagor's liability to give possession to the usufructuary mortgagee or in default to repay the mortgage money was a liability imposed by section 68 of the Transfer of Property Act and the suit must be regarded as one for breach of contract in writing registered governed by Article 116—*Uruchanian v Ahmed* 21 Mad 242 (In these cases the rulings in *Hanuman v Hanuman* 19 Cal 123 P C and *Sawaba v Abaji* 11 Bom 475 were distinguished on the ground that the Privy Council case referred to a sale deed executed prior to the passing of the T P Act and the Bombay case was decided before the T P Act was extended to that province) *A fortiori* where a registered deed of sale contained an express covenant to the effect that in the event of a claim being advanced by a co-sharer or in the event of the purchaser losing any part of the property in any other way he would be entitled to a refund of the consideration and to damages and the purchaser failing to get possession of part of the property purchased sued for refund of a proportionate part of the consideration money and for damages held that the suit was governed by Article 116 and not by Article 97—*Mul Hanwar v Chatter Singh* 30 All 40. *Rani Jaggi v Kaulashar* 30 All 405 (Footnote) So also is a case of lease—*Zemindar of Lisai agra v Behara* 25 Mad 87 (57)

A obtained possession of a certain revenue paying property under an order passed in mutation proceedings and whilst in possession collected rents from the tenants and paid the revenue due in respect of the property. But the order in favour of A was subsequently set aside and he had to relinquish possession and refund to the tenants the rents collected. Thereupon he brought a suit to recover the revenue he had paid during the period of his possession. Held that the suit was governed by Article

61 and not by Article 9. The consideration for payment of revenue could not be the realisation of rents from the tenants: the revenue was paid because the property was liable for revenue and demand was made for it: it was payable by the person in possession whether he had collected rents or not: and the refund of rents cannot be said to be a failure of the consideration. Nor can it be said that the fact that he was in possession was a consideration for the payment of revenue—*Alayar v Bibi Kunwar*, 42 All 61 (62-63).

437 Other suits.—The pre-emptor obtained a decree for pre-emption allowing him to purchase the property at Rs. 1595. He paid the money to the vendor out of Court. But on appeal the amount was raised to Rs. 1994 and as the amount was not paid within the specified time the decree for pre-emption became void. A suit brought by the pre-emptor against the vendor for the refund of the amount of Rs. 1595 fell under this Article or Art 170 and not under Art 62—*Koji v Ishar* 8 All 273.

The plaintiff sued for sale of a mortgaged property on foot of a registered mortgage. The property however being a cultivatory holding and thus not being liable to sale the plaintiff in his replication desired a money decree. There was a further plea of the plaintiff that the defendant had fraudulently represented the property to be alienable property but no fraud was found to have been proved. Held that the suit did not fall under Article 97 because there was no existing consideration whatever from the very inception of the mortgage the property in suit being not alienable. The suit fell under Art 116—*Thamman v Dalchand* 9 O L J 171 67 Ind Cas 593 A I R 1922 Oudh 113.

A usufructuary mortgagee assigned the mortgage to another person by an unregistered instrument for a consideration duly paid and put him in possession. Sometime after the mortgagor sued both the assignor (mortgagee) and the assignee for redemption and the Court passed a decree for redemption but refused to recognise the title of the assignee on account of the deed of assignment being unregistered. Thereupon the mortgagor redeemed the property by paying the money to the mortgagee (assignor) and got back possession. The assignee who had to give up possession then brought the present suit to recover from the assignor the consideration for the assignment. Held that the suit fell under this Article and time ran when the assignor received the mortgage money from the mortgagor. The suit also fell under Art 62 in as much as the assignor by receiving the mortgage-money in fraud of the assignee had received it for the latter's use—*Sriramulu v Chenna* 25 Mad 396.

Where the defendant borrowed money from the plaintiff on an unregistered mortgage and put him in possession but subsequently taking advantage of the non registration of the mortgage-deed put him out of possession it was held that a suit by the plaintiff for the amount due would

be governed by this Article and time ran from the date of dispossession—*Gurmukh v Chandu*, 183 P. R. 1888

Where goods already paid for are afterwards found to be short delivered, a suit to recover the amount overpaid will be governed by this Article, the date of the failure of consideration being the date of delivery—*Atul v Lyon*, 14 Cal 457

A suit by an auction purchaser against the decree-holder under sec 315 C P Code, 1882 (O 21, r 93 of the Code of 1908) to recover purchase-money on the ground that the judgment debtor had no saleable interest in the property sold is governed by Article 62, and not by this Article. Since the judgment-debtor had no title to the property that was sold as his property, there was no consideration at all for the purchase-money that was paid and the suit fell not under Article 97 but under Article 62—*Ram Kumar v Ram Gour*, 37 Cal. 67 (70). The Madras High Court was of opinion that a suit under sec 315 C P Code by the auction purchaser for refund of purchase-money on the ground that the judgment-debtor had no saleable interest, was held to be governed by Article 120, no special period of limitation being fixed for such suit by any other Article—*Nilakanta v Imamsahib*, 16 Mad 361 (363). In a recent case the Calcutta High Court has pointed out that the wording of O 21 r 93 C P. Code of 1908 is different from the wording of sec 315 of the C P Code of 1882, and that the remedy of an auction purchaser under O 21 r 93 to recover his purchase-money on the ground that the judgment-debtor had no saleable interest is not by a suit, but by an application under Article 181 (whereas his remedy under the Code of 1882 was often by a suit or by an application)—*Matar Ali v Sarfuddin*, 50 Cal 115 (122).

But where upon the sale being set aside at the instance of the judgment-debtor under sec 311 C P Code (1882) a suit is brought by the auction purchaser for recovery of a sum of money not from the decree-holder but from a third person who had, after the sale and the deposit of the money in Court, attached that sum in execution of his decree against the judgment-debtor, as representing the surplus sale proceeds belonging to the original judgment-debtor after satisfaction of the decree obtained against the debtor by the decree holder, the suit is governed by Article 120; neither Art 62 nor Art 97 applied to the case, because those Articles contemplate a suit between the contracting parties to the sale which afterwards proves infructuous; but in the present case, the suit by the auction purchaser against a third party cannot be regarded as a suit between the contracting parties to the sale—*Amrita Lal v Jogendra*, 40 Cal 187 (191).

A suit by the auction-purchaser for refund of money paid for land purchased in a sale held for arrears of rent under the Madras Rent Recovery Act (VIII of 1865), which was afterwards set aside, is governed by this Article—*Apparao v District Board*, 17 M. L. J. 298

A being indebted to B agreed to sell him certain property setting off

the debt against the purchase-money. No money was paid, and disputes arising as to the other terms of the agreement a litigation followed in which the agreement was held to be unenforceable. B then brought a suit against A for the debt, and A pleaded limitation. It was held that the amount claimed by B should no longer be regarded as the old debt, that the old debt had changed its character, having been the subject of an agreement by which it became the consideration for a proposed sale of land, and that the sale being declared unenforceable the present suit must be deemed as one to recover money paid on a consideration which has failed, and that limitation ran from the date of the dismissal of the former suit (by which the contract was declared unenforceable), that being the date of the failure of consideration—*Bassi Kuar v Dhum Singh*, 11 All 47 (P C) overruling *Dhum Singh v Ganga Ram*, 8 All 214. See this case cited in Note 102 under sec 9.

438. Partial failure of consideration.—A case of *partial* failure of consideration does not fall under this Article. Thus, under a compromise which was incorporated in a decree of Court, the plaintiffs were to become the owners of certain parcels of property on payment of a sum of money to the defendant. They paid this money but afterwards they were dispossessed from part of the property. The plaintiffs sued to recover the money they had paid for the property in suit alleging that the existing consideration failed within the meaning of this Article. Held that as the plaintiffs are still in possession of part of the property dealt with by the compromise they were not entitled to bring a suit for the entire consideration, the fact that they are in possession of some of the properties transferred goes to the root of their title to recover the purchase money on the ground of failure of the existing consideration. If part of a consideration is in the hands of the plaintiffs, it is not a case of failure of consideration—*Karim Bux v Abdul Wahid*, 27 O C 348, 11 O L J 323, 1 O W. N. 416, A. I. R. 1924 Oudh 377. But see the case of *Venkatarama v Venkata*, 24 Mad 27 cited under Note 440, in which the suit was based on a partial failure of consideration, and yet this Article was applied, but it appears that virtually there was a total failure of consideration in that case.

439. Fraud.—When fraud is alleged, the suit falls under Article 95. Thus, where a person owed money to another, and assigned to him a debt which he alleged to be due to him from a third party, and the assignee's suit against this last person was dismissed on the ground that no debt was due from him to the assignor, a subsequent suit by the assignee against the assignor for damages on the ground that the assignor had by deceitful misrepresentation induced the assignee to take the assignment, is governed by Article 95 and not by Art 62 or 97—*Punnayil v Raman Nair*, 31 Mad. 230 (233).

440. Starting point of limitation.—The date of failure of consideration which is the starting point of limitation, must be determined

reference to the particular facts of each individual case. Where a lessee was evicted by a person claiming a title superior to the lessor the cause of action for a suit by the lessee against the lessor to recover the amount of premium paid for the lease arose not from the date when the successful claimant obtained a decree against him for possession but from the date when he was *actually evicted* in execution of that decree—*Sukmoy v. Shashi* 10 Ind. Cas. 486 (Cal.)

In a suit by an auction purchaser to recover purchase money under sec. 315 of the C. P. Code 1882 (O. 21 r. 93 of the Code of 1908) on the ground that the judgment-debtor had no title to the property sold the cause of action arises not on the date when the Court of first instance decides that the judgment-debtor had no saleable interest in the property but on the date on which the auction purchaser is *actually dispossessed* in pursuance of a decision of the High Court on appeal from the decree of the first Court—*Goshidaza v. Gangawa* 22 Bom. 783 (1895). But the Madras High Court is of opinion that the starting point of limitation is the date of the decree of the first Court declaring the judgment-debtor to have no saleable interest in the property and not the date of the decree of the appellate Court confirming the first Court's decree—*Vadukar v. Kuttayil* 16 I. W. 285 A. I. R. 1923 Mad. 23 70 Ind. Cas. 45. The Calcutta High Court holds that time runs from the date when the sale is set aside on the ground of defect of title of the judgment-debtor and not from the date when the plaintiff actually lost possession—*Bijay v. Pradyuman Singh* 30 C. W. N. 79 91 Ind. Cas. 765 A. I. R. 1906 Cal. 77 follow in *Jusurn v. Prithi Chand* 46 Cal. 670 (P. C.). In this Privy Council case a purchaser of a patni under Reg. VIII of 1819 brought his suit for recovery of purchase money from the remainder as the sale of the patni had been set aside on the suit of a darpada dar. The Judicial Committee held that the period of limitation ran from the date of the decree of the Court of first instance setting aside the sale and not from the date of the appellate decree affirming the first Court's decree nor from the date when the purchaser lost possession.

Where a purchaser under a voidable sale-deed from a qualified owner is dispossessed in execution of a decree obtained by a person entitled to avoid the sale the period of limitation for a suit by the purchaser for the return of the price runs not from the date of the decree but from the date of actual dispossession in execution of the decree—*Santara Varar v. Ummer* 46 Mad. 40 see also *Mahomed Ali v. Budkarsu* 30 M. L. J. 449 (455) *Hariharamangalak v. Santara v. Kalathil* 43 M. L. J. 721.

Where the purchaser was dispossessed of the property by reason of defect of the title of the vendor the period of limitation for a suit by the purchaser for refund of consideration money ran from the date when the possession was disturbed and not from the date of the sale-deed—*Sulley v. S.*

v Rajagopala 38 Mad 887, *Meenakshi v Krishna*, 32 Ind Cas 176; *Ram Chander v Tohsah Bharti*, 26 All 519

The defendant and his son agreed to sell a certain house to the plaintiff. The defendant having failed to convey the property, the plaintiff sued for specific performance and obtained a decree in pursuance of which the price was paid and a conveyance executed. But the plaintiff not having been given possession sued for possession. It was then found that the sale did not bind the son's interest in the property, and that though the plaintiff was entitled to possession of the father's share a division ought not to be effected, on the ground of inconvenience attending the division of the house. The plaintiff was awarded the value of the defendant's share. He now sued to recover the balance of the price paid, on the ground of failure of consideration to the extent of the son's share. *Held* that the failure of consideration must be taken to have occurred when it was found in the suit for possession that the plaintiff was not entitled to recover the son's share—*Venkatarama v Venkatasubramanian*, 24 Mad 27 (31)

Where in a suit for specific performance of a contract to sell or for refund of the earnest money in the alternative, the Court finds the contract to be unenforceable, a decree would be passed for refund of the money and the consideration must be deemed to have failed from the date of the judgment pronouncing the contract to be unenforceable, and the claim for refund is not therefore barred by limitation—*Amina Bibi v Udit*, 31 All 68 (P C) (affirming on appeal *Udit v Minna*, 25 All 618). Similarly, where a suit for specific performance of a contract for sale of a certain property is dismissed, and the plaintiff afterwards brings a suit for recovery of the earnest money he had paid in pursuance of the contract for sale, the period of limitation for this suit begins to run from the date of the judgment dismissing the plaintiff's previous suit for specific performance—*Munni Bahu v Kunwar Kamta Singh* 45 All 378 21 A L J 265 72 Ind Cas 86 A I R 1923 All 321

In September 1908 defendant No 1 contracted with the plaintiff for a price to procure from defendant No 2 a reconveyance of certain property to the plaintiff. The property at that time was already in the plaintiff's possession. In November 1908 the defendant No 2 conveyed his property to V, who sued to recover its possession from the plaintiff, and obtained a decree in July 1911. In January 1912 the plaintiff sued to recover the consideration money from the defendant No 1. It was held that the suit was time barred, the cause of action arising in November 1908 the moment there was a conveyance to V, although the plaintiff retained possession till 1911, that possession was merely on sufferance and by the grace of V—*Gulab Chand v Narayan*, 41 Bom 31

A, a purchaser from a junior member of his share in joint family properties, attempted to take possession thereof, but was a prior purchaser of those properties from the manager of the then

instituted a suit for the recovery of the share purchased by him and the litigation was carried up to the High Court whose decision was against him. Within three years of the date of the judgment of the High Court but more than three years after the date on which he was resisted. A instituted a suit for the recovery of the sale price and of the costs incurred in the unsuccessful litigation. *Held* that the suit was not barred by limitation as the consideration for the sale failed on the date of the High Court's decision and the cause of action for the suit arose only on that date—*Sarvothama v Chinnasami* 42 Mad 507

98—To make good out of the general estate of a deceased trustee the loss occasioned by a breach of trust	Three years	The date of the trustee's death, or if the loss has not then resulted the date of the loss
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441 General estate—The joint family property of the father and sons which passes by survivorship to the sons on the death of the father does not form the general estate of the deceased trustee (father) within the meaning of this Article—*Subramania v Gopala* 33 Mad 308

99—For contribution by a party who has paid the whole or more than his share of the amount due under a joint decree or by a sharer in a joint estate who has paid the whole or more than his share of the amount of revenue due from him self and his co-sharers	Three years	The date of the payment in excess of the plaintiff's own share
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442 Change—The words the whole amount in the Act of 1877 have been changed into the whole or more than his share of the amount in the Act of 1908

Under the old Act this Article did not apply to a case where not the whole but only a part of the money due under a joint decree was realised from the plaintiff and therefore where a decree holder having a joint decree against the plaintiff and the defendant brought to sale the property of the plaintiff and received out of the sale proceeds a part of the decretal amount this Article did not apply to a suit for contribution brought by

the plaintiff against the defendant and it was doubtful whether Art 61 or 120 applied—*Pattabhiramayya v Ramayya* 20 Mad 23

In *Ibn Hasan v Brijbhukhan* 26 All 407 also Stanley C J doubted whether this Article applied to a case where only a part of the money was realised from the plaintiff. But this doubt has been removed by the change introduced into the present Article and a suit such as one mentioned above would now fall under it

443 Payment whether creates a charge.—In *Khub Lal v Pudmanand* 15 Cal 547 it has been held that where a co sharer of a revenue paying estate pays the whole amount of the arrears of revenue in order to save the estate from sale he does not thereby acquire any charge upon the shares of the other co sharers but is only entitled to contribution consequently his suit falls under Article 99 and not under Article 132. See also *Upendra v Gwindra* 25 Cal 565 (569) *Kinoo Ram v Mutaffar* 14 Cal 809 F B (overruling *Enayet Hussain v Muddunmoonee* 14 B L R 155) *Kristo Mohini v Kali Prosanna* 8 Cal 402 *Shivrao v Pundlich* 26 Bom 437. This view is based on the following observations of Cotton L J in *Falcke v Scottish Imperial Assurance Co* (1886) 34 Ch D 234 (at p 241). A man by making a payment in respect of property belonging to another if he does so without request is not entitled to any lien or charge on that property for such payment. In the same case Bower L J observed. The general principle is beyond all question that work and labour done or money expended by one man to preserve or benefit the property of another do not according to English law create any lien upon the property saved or benefited. In another English case also it has been held that the right to contribution is a personal right and this remedy is a personal remedy and there is no lien in respect of which the contribution arises—Per Fry J in *Leslie v French* (1883) 23 Ch D 552 (564).

But a contrary view has been taken in another set of cases. Thus in *Achut v Hari* 11 Bom 313 *Ram Datt v Horakh* 6 Cal 549 *Seshagiri v Pichu* 11 Mad 452 *Rajah of Vizianagram v Rajah Setruckerla* 26 Mad 686 (F B) *Alayakannal v Subbarayya* 28 Mad 493 (494) a payment of revenue by one of the co-sharers has been held to create a charge in his favour so as to entitle him to take advantage of Article 132.

The way in which the two lines of decision may be reconciled is that if a money decree is sought then three years is the period of limitation but if the over payment is a charge on the land and it is sought to recover it out of the land then the case falls under Article 132.—Starling 5th Edn pp 298 299

444 Voluntary and involuntary payment.—In cases in which the right to contribution exists under the law it is immaterial whether the party seeking contribution paid the money voluntarily or involuntarily whether he made the payment of his own will and thus averted a

process against his property or whether the amount was realised by seizure and sale of his property—*Raja of Vizianagram v Raja Setruckerla* 26 Mad 686 at p 693 (F B) In an earlier case the Calcutta High Court was of opinion that money realised by the sale of plaintiff's property was not money paid within the meaning of Arts 61 and 99—*Janki v Domi* 18 C W N 480 But in a recent case it has adopted the more liberal view and laid down that it does not matter whether the money in respect of which the right of contribution arises was actually handed over by the party seeking contribution or was realised from him by coercive process by the creditor as for instance by execution of a decree In either case the right of contribution arises from the fact that one of the co-debtors has paid in excess of his share and the joint liability of all of them has been discharged—*Gopi Nath v Chandra Nath* 26 C W N 340 57 Ind Cas 834

It seems that the words or more than his share would imply involuntary payments A person who would voluntarily pay would pay the whole and not anything less

445 Starting point of limitation —Where the payment is voluntarily made under a decree limitation runs from the date when the excess money was actually paid to the decree holder—*Radha v Rupakunder* 3 C L R 480

Where the payment is involuntary (i.e. where money is realised by attachment and sale) limitation runs from the time the judgment creditor took the money out of the Court and not from the date when the money was realised by execution sale—*Pattabhisramayya v Ramayya* 20 Mad 23 *Fuchoruddeen v Mohima* 4 Cal 529

446 Suits under this Article —Where by an agreement of partnership every partner was at liberty to borrow money on his own credit and to pay the money into the firm for carrying on the business and where a partner borrowed money on his individual credit for the benefit of the business and afterwards the money was realised from him under a decree by the creditor a suit by the partner for contribution against the other partners was maintainable and would be governed by this Article—*Durga Prosonna v Raghunath* 26 Cal 254 (257)

A mortgagee was directed to pay off a prior mortgage out of the consideration for his own mortgage Default having been made in payment the prior mortgagee sued both the mortgagor and the subsequent mortgagee and obtained a joint decree The mortgagor paid off the decree and sued to recover the amount from the subsequent mortgagee Held that the suit was governed by Article 99 and not by Article 61 or 116 and the period of limitation ran from the date when the decree was satisfied by the mortgagor—*Lakhi v Mural Tiwari* 22 A L J 737 A I R 1924 All 843 83 Ind Cas 875

447 Suits not under this Article —Where rent and not revenue is paid by one of the co-sharers in respect of the entire holding a suit for

contribution is governed by Art 61 (and not by this Article)—*Swarnamoyi v Hari Das*, 6 C W N 903 (904) But in *Thanskachella v Shudachella*, 15 Mad 258, this Article was applied to such a suit. No reason is stated and the judgment is a very short one. Probably the learned Judge overlooked the fact that the word 'revenue' and not 'rent' is used in the Article. Moreover the rent was not paid in pursuance of a decree for rent, so as to make the earlier part of this Article applicable. The judgment is therefore incorrect.

When a person *other than a co sharer* (e. g. a lessee) pays off the revenue to save his interest in the estate, a suit by him to recover the money cannot be said to be a suit for 'contribution', he is entitled to a charge on the property and therefore Article 132 will govern his suit—*Ram Dutt v. Horakh*, 6 Cal 549.

Where the owner of two villages sold under a decree obtained upon a mortgage which included other villages claims contribution proportionately against the owners of those other villages (who were not however made parties in the mortgage suit), *held* that Article 99 cannot apply as this is not a case where a person has paid money under a joint-decree. The plaintiff is entitled to a charge on the other properties and the suit is governed by Article 132—*Idn Husain v Ramdas*, 12 All 110. See also *Bhagwan Das v Karam Husain*, 33 All. 708 (F. B.)

100.—By a co trustee to enforce against the estate of a deceased trustee a claim for con- tribution	Three years	When the right to contri- bution accrues.
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418 Limitation does not run against a trustee claiming contribution against a co-trustee in respect of a liability incurred by loss occasioned to the trust-estate by the joint default of the trustees, until the claim of the *cestui que trust* has been established against one of them—*Robinson v. Har-kin*, [1896] 2 Ch 415.

101.—For a seaman's wages	Three years.	The end of the voyage during which the wages are earned.
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102.—For wages not otherwise expressly provided for by this Schedule.	Three years.	When the wages accrue due.
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449. The plaintiffs, who were hereditary temple servants paid monthly wages, being suspended from their offices by the trustees,

process against his property or whether the amount was realised by seizure and sale of his property—*Raja of Vizianagram v Raja Setrucharla* 26 Mad 686 at p 693 (F B) In an earlier case the Calcutta High Court was of opinion that money realised by the sale of plaintiff's property was not money paid within the meaning of Arts 61 and 99—*Janki v Doms* 18 C W N 480 But in a recent case it has adopted the more liberal view and laid down that it does not matter whether the money in respect of which the right of contribution arises was actually handed over by the party seeking contribution or was realised from him by coercive process by the creditor as for instance by execution of a decree In either case the right of contribution arises from the fact that one of the co-debtors has paid in excess of his share and the joint liability of all of them has been discharged—*Goti Nath v Chandra Nath* 26 C W N 340 57 Ind Cas 884

It seems that the words or more than his share would imply involuntary payments A person who would voluntarily pay would pay the whole and not anything less

445 Starting point of limitation —Where the payment is voluntarily made under a decree limitation runs from the date when the excess money was actually paid to the decree holder—*Radha v Rupchunder* 3 C L R 480

Where the payment is involuntary (i.e. where money is realised by attachment and sale) limitation runs from the time the judgment-creditor took the money out of the Court and not from the date when the money was realised by execution sale—*Pallabhramayya v Pamayya* 20 Mal 23, *Fuchoruddeen v Mohima* 4 Cal 520

446 Suits under this Article —Where by an agreement of partnership every partner was at liberty to borrow money on his own credit and to pay the money into the firm for carrying on the business and where a partner borrowed money on his individual credit for the benefit of the business and afterwards the money was realised from him under a decree by the creditor a suit by the partner for contribution against the other partners was maintainable and would be governed by this Article—*Durga Prosonna v Raghunath* 26 Cal 254 (257)

A mortgagee was directed to pay off a prior mortgage out of the consideration for his own mortgage Default having been made in payment the prior mortgagee sued both the mortgagor and the subsequent mortgagee and obtained a joint decree The mortgagor paid off the decree and sued to recover the amount from the subsequent mortgagee Held that the suit was governed by Article 99 and not by Article 61 or 116 and the period of limitation ran from the date when the decree was satisfied by the mortgagor—*Lakhi v Mural Tiwari* 22 A L J 737 A I R 1924 All 843 83 Ind Cas 875

447 Suits not under this Article —Where rent and not revenue is paid by one of the co sharers in respect of the entire holding a suit for

contribution is governed by Art 61 (and not by this Article)—*Swarnamoyi v Hari Das* 6 C W N 903 (904) But in *Thanikachella v Shudachella* 15 Mad 258 this Article was applied to such a suit. No reason is stated and the judgment is a very short one. Probably the learned Judge overlooked the fact that the word revenue and not rent is used in the Article. Moreover the rent was not paid in pursuance of a decree for rent, so as to make the earlier part of this Article applicable. The judgment is therefore incorrect.

When a person *other than a co sharer* (e g a lessee) pays off the revenue to save his interest in the estate a suit by him to recover the money cannot be said to be a suit for contribution. He is entitled to a charge on the property and therefore Article 132 will govern his suit—*Ram Dutt v Horakh* 6 Cal 549.

Where the owner of two villages sold under a decree obtained upon a mortgage which included other villages claims contribution proportionately against the owners of those other villages (who were not however made parties in the mortgage suit) *held* that Article 99 cannot apply as this is not a case where a person has paid money under a joint-decree. The plaintiff is entitled to a charge on the other properties and the suit is governed by Article 132—*Ibn Husain v Ramdas* 12 All 110. See also *Bhagwan Das v Karam Husain* 33 All 708 (F B).

100—By a co trustee to enforce against the estate of a deceased trustee a claim for contribution	Three years	When the right to contribution accrues
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418 Limitation does not run against a trustee claiming contribution against a co trustee in respect of a liability incurred by loss occasioned to the trust-estate by the joint default of the trustees until the claim of the *cestus que trust* has been established against one of them—*Robinson v Harbin* [1896] 2 Ch 415

101—For a seaman's wages	Three years	The end of the voyage during which the wages are earned
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102—For wages not otherwise expressly provided for by this Schedule	Three years	When the wages accrue due
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419 The plaintiffs who were hereditary temple servants paid in monthly wages being suspended from their offices by the trustees brought

a suit questioning the legality of the suspension against the trustees and also against the persons who discharged their duties during their suspension for pay for the period of suspension for the value of perquisites payable from the temple as well as from other sources during such period and for damages for mental distress loss of dignity etc It was held that as regards the pay and perquisites payable by the temple the suit was governed by Art 102 and not by Art 47 or 101 that as regards the perquisites which were received from third persons they were not wages and Art 102 would not apply but Art 36 and as regards the claim against the persons who received the plaintiffs' pay and perquisites during the period of suspension the suit might fall under Article 62—*Baradwaja v Arunachala* 41 Mad 528 (537) 45 Ind Cas 414

For the meaning of wages see Notes under Article 7

A suit by the *dwars* of a temple for recovery of certain dues which they claim to be payable to them as remuneration in respect of their services in connection with the temple does not fall under this Article because the *dwars* are not paid regular recurring wages but are entitled to certain specific payments as emoluments attached to their hereditary office The suit falls under Article 120—*Sri Sri Balayanath Jiu v Har Datt* 3 Pat 249 7 P L T 465 94 Ind Cas 826 A I R 1926 Pat 205

A wet nurse is not a domestic servant under Article 7 a suit by her to recover her wages falls under Article 102—*Mohan Lal v Jumerat* 10 A L J 395 17 Ind Cas 658

A *bisardar* in Oudh is not a domestic servant and a suit by a *bisardar* for wages falls under Article 102 and not under Article 7—*Ghani Ram v Uma Datta* 26 O C 327 10 O L J 348

A suit for wages by a weighman in a shop is governed by this Article and not by Article 7—*Mutsaddi v Bhagwan* 48 All 164; see this case cited in Note 263 under Art 7

103 —By a Muhammadan	Three	When the dower is de
for exigible dower	years	manded and refused or
(<i>mu'ajjal</i>)		(where during the con
		tinuance of the mar
		riage no such demand
		has been made) when
		the marriage is dis
		solved by death or
		divorce

450 Where a wife demanded only a portion of her prompt dower from her husband during his lifetime limitation as to her claim to the remainder will count from the date of her husband's death and not from

the date of her former demand—*Begoo Jaun v Gashee Beebee* 6 W R. Civ Ref 19

Prompt or exigible dower may be considered as a debt always due and demandable and certainly payable upon demand and therefore upon a *clear and unambiguous demand* and refusal a cause of action would accrue and the Statute would begin to run. An application by a Mahomedan lady for leave to sue her husband *in forma pauperis* for her dower which was rejected was not held to constitute a demand for prompt dower sufficient to set the period of limitation running—*Khajooroonissa v Ryee soonnissa* 24 W R 163 (P C)

A suit by the heirs of the deceased wife against the husband for prompt as well as deferred dower is not a suit for recovery of the goods of the deceased in the hands of the defendant but a suit under Articles 103 and 104. It is a suit based on a contract which the heirs of the wife are entitled to enforce—*Assatulla v Danis Mohamed* 50 Cal 253 (256 257) 36 C L J 379 70 Ind Cas 169 A I R 1923 Cal 152 *Md Mozaharai v Md Asimaddin* 27 C W N 210 37 C L J 108 A I R 1923 Cal 507

If the deed of dower be registered Article 116 would apply—*Assatulla v Danis Muhammad* (supra) *Md Mozaharai v Md Asimaddin* (supra)

104—By a Muhammadan	Three	When the marriage is dis
for deferred dower	years	solved by death or
(<i>mu wajjal</i>)		divorce

451 A suit by the heirs of the wife for deferred dower falls under this Article—*Assatulla v Danis Muhammad* 50 Cal 253 (257) *Mahomad Ishaq v Akramai Haq* 12 C W N 84 6 C L J 558 *Mir Mahab v Amans* 2 B L R 306 Where a Muhammadan widow remains in possession of her husband's property in lieu of her dower but is afterwards dispossessed by the other heirs of her husband and then dies and a suit is brought by her heirs to recover the balance of the dower debt due to her out of the assets in the hands of the heirs of her husband the suit is not governed by Article 104—*Hamidullah v Najjo* 33 All 568 (570) 8 A L J 578 10 Ind Cas 282

105—By a mortgagor	Three	When the mortgagor re
after the mortgage has	years	enters on the mort-
been satisfied to re		gaged property
cover surplus collec-		
tions received by the		
mortgagee.		

452 Where a mortgagee takes possession of the mortgaged property as a security for his debt he has no right to be in possession of the estate after he has paid himself what is due to him out of the property. If

holds the property subsequent to his having been paid, the mortgagor would be entitled to possession and surplus profits together with interest thereon. The limitation applicable to a suit for recovery of such profits with interest thereon is that provided by this Article—*Abdul Hassan v. Jagwanth*, 32 Ind Cas 729 (Oudh).

A usufructuary mortgage contained a stipulation that the mortgagee should deduct the interest from the collections and pay over the balance annually to the mortgagors, the property being redeemable on payment of the principal money on the expiry of seven years. After redemption of the mortgage without the intervention of the Court, a suit was brought by the mortgagor for the recovery of the balance of collections which remained in the hands of the mortgagee after deducting the interest for the years during which the collections had been made. The defendant pleaded that the suit was governed by Article 109, and that the cause of action arose each year for the profits of that year, and that the suit was time barred. *Held* that Art. 109 did not apply because it could not be said that the profits were *wrongfully* received by the defendants, when the deed expressly gave them power to realise the profits, though they were no doubt required to pay over the profits to the plaintiff. The suit fell under the purview of Article 105 and having been brought within three years from the date of restoration to possession, was within time. The use of the word 'annually' in the deed did not make the cause of action accrue year by year, the ordinary principle regulating the rights of the mortgagee is that when he is in possession of the property he must account to the mortgagor for all sums realised in excess of the amount to which he was entitled, and it is at the time of redemption that accounts are made up and settled between the parties—*Bikramji v. Raj Raghobar*, 20 O C 25, 38 Ind Cas 610.

Art. 105 should not be construed so as to conflict with the provisions of sec. 43 C P Code (1832), and must be deemed to refer to cases where the mortgagor has got possession of the mortgaged property *otherwise than by a suit for redemption*, for where a mortgagor brings a suit for redemption, he is bound to claim an account for any surplus received by the mortgagee after discharge of the mortgage debt and if he omits to make such claim in that suit, he cannot maintain a second suit for recovery of the surplus collections, section 43 C P Code being a bar to such a suit—*Ram din v. Bhub*, 30 All 225 (228, 230). The ruling in 30 All 225 has been followed by the Calcutta High Court in *Prasanna v. Nilambar*, 26 C W. N. 123. The Bombay High Court likewise holds that a redemption suit has for its purpose the complete adjustment of the rights of the parties, and therefore if a mortgagee at first brings a suit for redemption but in that suit does not claim to recover the surplus profits, a subsequent suit for recovery of the surplus collections is barred by *res judicata*, because the claim is one which ought to have been decided in the suit for redemption—*Vinayak v. Dattatraya*, 26 Bom 661 (668).

But where the mortgagor brings a suit for redemption without claiming for the surplus collections and gets a decree he can afterwards bring a suit contemplated by this Article *by permission of the Court* obtained under section 43 C P C. 1882 (O II r 2 of the Code of 1908) Although when a redemption suit is brought the claim for surplus collections should be made along with the claim for redemption still *if permission be obtained* under sec 43 C P Code to bring a subsequent suit for the recovery of the surplus collections there is no conflict between the provisions of this Article and those of sec 43 C P Code—*Muhammad Fayaz v Kallu Singh* 33 All 244 (247) 8 Ind Cas 689 7 A L J 1201 (distinguishing *Ram din v Bhup Singh* 30 All 225)

A suit by a mortgagor against a mortgagee brought after redemption of the mortgage for compensation for loss caused by the latter having cut down trees standing on the mortgaged property during the subsistence of his possession is governed by this Article and not by Article 109 and the period of limitation runs from the time when the mortgagor re-enters on the property—*Ram Sukh v Indar Kumar* 6 O L J 53 50 Ind Cas 152

Where in a suit for redemption of a usufructuary mortgage the mortgagor alleges that if accounts were taken a large sum would be found due from the mortgagee and the mortgagor accordingly prays that an account may be taken and a decree may be passed for the amount which may be found due to him after adjustment of accounts *held* that since the claim for recovery of the surplus profits received by the mortgagee is a relief which is a part of the suit for redemption itself Article 105 does not apply, and if the suit for redemption is brought within the period of limitation prescribed by Article 148 the claim for surplus profits is not barred—*Prasanna v Nilambar* 26 C. W N 123 64 Ind Cas 75 A I R 1922 Cal. 189

A subsequent suit for recovery of surplus profits is maintainable where the profits have been received by the mortgagee after the mortgagor has deposited the redemption money in Court But such a suit is not a suit for surplus collections received by the mortgagee because the collections were made by a person who had ceased to be a mortgagee—*Sahari Dutta v Sheikh Asinuddy* 14 C W N 1001 (1005)

106—For an account and a share of the profits of a dissolved partner- ship	Three years	The date of the dissolu- tion
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453 Dissolved partnership—This Article applies to suits brought after the dissolution of partnership So long as a partnership subsisting a suit for *share and accounts* is not maintainable suit for partnership *accounts only* may be allowed under

cumstances, where equity requires such a course—*Kassa v Gopi*, 9 All 120 (121), and to such a suit Art 120 and not Art 106, applies—*Gokul v. Sasimukhi*, 15 C L J 204

A suit which is in terms one for dissolution of a continuing partnership, and stated in the plaint to be so is governed by Art 120, and not by this Article, even though the parties treated the suit as one for accounts of a dissolved partnership—*Narayanaswami v Gangadhara* 37 M L J 353 48 Ind Cas 89 *Haramohan v Sudarshan* 25 C W N 847

A suit for a declaration that a partnership existed between certain persons praying that if the partnership still existed it might be dissolved, and that if it had been dissolved the date of the dissolution may be fixed, and that in either case a liquidator may be appointed to take an account, and, after realising assets and discharging obligation, to pay to the plaintiff his share of the balance, is a suit for dissolution of partnership governed by Art 120, and not by this Article—*Harrison v Delhi and London Bank*, 4 All 437 (451)

A suit for division of immoveable property which formed part of the partnership assets, after the dissolution of partnership is governed by this Article—*Gobardhan v Ganeshi*, 11 Ind Cas 288 (All)

A suit was brought in 1900 for account and share in a property acquired by the plaintiff and the defendant as undivided brothers in a contract business carried on by them by an implied agreement of partnership till 1894, and then continued by the defendant alone till the date of suit Held that the suit fell under this Article and being brought more than three years after the agreement came to an end in 1894, was barred—*Sudarsanam v Narasimhulu* 25 Mad 149

Where the manager of a joint Hindu family enters into a partnership for the family benefit with a person who is a stranger to the family the partnership is dissolved on the death of the manager, in the absence of any agreement with the surviving members of the family, and the fact that some of the goods which were purchased during the subsistence of the partnership were sold after the dissolution, with the consent of one of the surviving members of the family, is not an indication that the partnership continued The goods had to be sold and converted into cash after the dissolution as there was no necessity of keeping them, they merely represented the assets of the partnership—*Rambhau v Prayag Das*, 20 N L R 49, 8 Ind Cas 198, A I R 1924 Nag 263. *Sokkandha v Sokkandha*, 28 Mad 344

Where, after a partnership has been dissolved by death of one partner, the surviving partners continue to carry on the business, as if no such dissolution has taken place, the statute of limitation is no bar to the taking of accounts of the new partnership by going into the accounts of the old partnership which have been carried on into the new partnership without interruption or settlement, and consequently a suit for an account and a

share of the profits (of the old as well as the new partnership) brought within three years of the dissolution of the new partnership is in time, and is not barred by this Article by reason of the lapse of more than three years from the date of dissolution of the old partnership—*Maharaj Kishen v Hargobind*, 101 P R 1914, 27 Ind Cas 69 *Ahinsa Bibi v Abdul Kader*, 25 Mad 26 (31), *Harchand v Jugal Kishore*, 63 Ind Cas 722 (Lah) *Abdul Jaffar v Venu Gopal* 46 M L J 503 80 Ind Cas 378, A I R 1924 Mad 708 It should be noted that the above rules will apply only if the suit is brought by a person who was a member of both the new and the old partnerships, or by a person who is a member of the new partnership only, if the suit is brought by a person who was a partner of the old partnership business only and not a member of the new partnership, and the suit is brought for the accounts of the old partnership and is instituted more than three years after the dissolution of the old partnership, though within three years from the dissolution of the new, the suit is barred—*Abdul Jaffar v Venugopal*, (supra)

This Article applies to a suit for an account and a share of the profits, that is, for an *unascertained* share of the profits of a dissolved partnership. But where after the dissolution of a partnership, accounts were taken and scrutinized between the partners and as a result of the scrutiny the defendant admitted in writing in the plaintiff's *bahi* a debit balance of Rs 4000 due from the defendant to the plaintiff, *held* that a suit for the amount did not fall under Article 106 but was a suit on an account stated under Article 64—*Nand Lal v Parlap*, 3 Lah 326

Presumption of dissolution —Where it is proved that since the establishment of the business in 1868 down to 1891, annual accounts were regularly rendered between the contending parties, and that these accounts entirely ceased in 1891 in which year a final account was made out showing a complete division of the partnership shares, it was held that the presumption was in favour of dissolution in the year 1891—*Joopoody v Pulavaris*, 36 Mad 185 (P C), 25 M L J 128, 17 C W N 1006 19 Ind Cas 513

454 *Suit by heir of a deceased partner* —When a member of the partnership dies, there is a dissolution of the firm, and a suit by the heir of the deceased partner against the surviving partners for an account and for the share of the deceased in the partnership assets, comes under this Article—*Jais v Banwar Lal*, 4 Lah 350 (P. C), *Mohit v Rajnarain*, 9 C. W. N. 537, *Nihal Devi v Kishore Chand*, 97 P R 1910, 8 Ind Cas 999, *Rambhau v Prayag Das*, 20 N L R 49, *Sokkhandha v Sokkhandha*, 28 Mad. 344.

Two Muhammadan brothers S and M carried on a business jointly and the property A was purchased out of the money acquired in the joint business, in the name of M S died 18 years before this suit On the death of S, his two sons carried on various business with M and one K and property B was purchased out of the earnings of these businesses 1'

more than three years before suit. The heirs of S now brought this suit against M for their share of the properties purchased out of the earnings of the several businesses and for their share of the monies collected therein. It was held that the suit to recover the share of the property A was barred under this Article about 15 years ago and the claim for a share in property B was also barred being brought more than three years after the death of K. Held also that Art 127 did not apply because in Muhammadian Law there is no such thing as joint family property. Even if Art 123 were to apply in respect of property A the suit is also barred—*Mohideen v Syed Meer Sah* 35 Mad 1099 32 Ind Cas 1002.

455 Suit by servant partner.—A suit by a servant remunerated by a share of the profits of the business for an account is governed by this Article and not by Art 120—*Kalidas v Drasipadi* 22 C W N 104 43 Ind Cas 893. The facts of this case have been fully cited in Note 15 under section 22.

456 Assets realised after dissolution.—It was held by the Bombay and Madras High Courts that where after the dissolution of a partnership a partner has realised some assets a suit by the other partner (or his representative) for recovery of his share in those assets is governed by Article 62 and would be maintainable if brought within 3 years of the date of the realisation though a suit for a general account in respect of the partnership business may be then barred under this Article—*Merwanji v Rustomji* 6 Bom 628. *Sokhandha v Sokhandha* 28 Mad 344. *Rivet Carnac v Gokuldas* 20 Bom 15. But this view has not been accepted by the Punjab Chief Court in *Ashai Devi v Kishore Chand* 97 P R 1910 8 Ind Cas 999 where it has been held that if a suit relating to the general account of a partnership business is barred by Article 106 it is equally barred in respect of the assets of the business realised after dissolution.

And recently the Privy Council has laid down the same opinion as has been expressed in the Punjab case—*Gopala Chetty v Vijayaraghavachariar* 45 Mad 378 (P C) 43 M L J 305 26 C W N 977 24 Bom L R 1197 20 A L J 862 (approving of the Punjab case and disapproving of the Bombay and Madras cases cited above).

457 Registered deed of partnership.—Even though the instrument of partnership is registered a suit for accounts and profits of a partnership would be governed by this Article and not by Article 116 because the latter Article is restricted to suits for compensation—*Vairavan v Ponnayya* 22 Mad 14.

458 Starting point of limitation.—In a partnership agreement it was stated that the partnership was to continue up to a certain date but prior to that date the partnership was dissolved. It was held that limitation ran from the actual date of dissolution and not from the date mentioned in the agreement—*Sooleman v Bhagwandas* 34 Bom 515 (516).

Where a partnership business began to fail in 1906 and was closed in 1909 and the only work done subsequently consisted in realising the assets paying debts due to creditors and recovering rents from tenants of immoveable property belonging to the partnership the business was held to have been dissolved in 1909 and a suit for rendition of accounts brought in 1913 was barred—*Amirchand v Jawahir* 1916 P W R 49

107 —By the manager of a joint estate of an undivided family for contribution in respect of a payment made by him on account of the estate	Three years	The date of the payment
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459 Where money is borrowed by the manager of a joint Hindu family on his personal security for purposes of necessity his right to contribution arises from the date when he expends the money The period of limitation in respect of his suit for contribution runs from that date and not from the date on which he repays the loan to the person from whom he borrowed and releases his security—*Aghore Nath v Grish Chunder* 20 Cal 18

Where the manager borrowed money and applied it for the purposes of the family and subsequently borrowed money to pay off the former loan and then paid off the second loan from his private funds limitation ran from the date on which he expended the first loan for family purposes and not from the date on which he borrowed money for the second time to pay off the first loan—*Ram Krishna v Madan Gopal* 12 W R 194

Where a manager borrowed money and spent it for family purposes and then executed a fresh bond in favour of the lender for the amount originally borrowed the period of limitation for his suit against the other members for contribution ran from the date on which he expended the money on behalf of the family and not from the date on which he gave the fresh bond—*Sunkur v Goury* 5 Cal 321

108 —By a lessor for the value of trees cut down by his lessee contrary to the terms of the lease	Three years	When the trees are cut down
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460 This Article applies only when a suit is brought by the landlord to recover the value of trees cut down by the tenants it does not apply where the landlord claims by way of set-off that in taking accounts a-

between himself and the tenants the value of trees cut down should be debited against the tenants who claim credit for the value of improvements made by them—*Pumpalia v I unhamma* 25 Ind. Cas 791 (Mad)

100 —For the profits of immovable property belonging to the plain tiff which have been wrongfully received by the defendant	Three years	When the profits are re ceived
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461 Scope of Article —This Article is applicable only to cases where the profits have been *wrongfully* received by the defendant but so long as the defendant remains in possession by virtue of a decree of the Court the receipt of profits during that period cannot be said to be *wrongful* therefore a suit for profits received by the defendant during that period is governed not by this Article but by Art 120—*Holloway v Ghuneshwar* 3 C L J 182

A suit by a mortgagor after the mortgage has been satisfied to recover the surplus collections realised by the mortgagee in possession is not a suit governed by this Article because it cannot be said that the mortgagee has *wrongfully* received those profits The suit falls under Article 105 which expressly provides for such a case—*Bikramjit v Raj Raghubar* 20 O C 25 38 Ind Cas 610 *Mad Fayaz Ali v Kallu Singh*, 33 All 244 (248)

462 Received —The word received means *actually* received the liability of the defendant is for the profits which he has actually received consequently if he had been out of possession for any part of time during the period of his wrongful possession no profit can be recovered from him for that time—*Abbas v Fasihuddin* 24 Cal 413 If the defendant has not received any profits at all the plaintiff cannot claim anything by way of *mesne profits* under this Article but can claim *damages* for trespass and his suit will fall under Article 39—*Ramasami v Authi Lakshmi Ammal* 34 Mad 502 In 24 Cal 413 the Judge made a passing observation that the plaintiff can claim *mesne profits* to the extent of what the defendant might have received with ordinary diligence during the period of his possession This observation was made unconsciously and was unnecessary for the decision of the case But it is true in one sense viz that the amount of damages will be measured by the amount of profits which the defendant might with due diligence have received [See section 2 (12) of C P Code 1908] But the claim is still one for *damages* and not for *mesne profits* See 34 Mad 502 at p 504

The plaintiff is entitled to recover the profits which have been received

by the defendant during three years previous to suit. Thus if the defendant had been in possession from 18th May 1900 to 11th September 1901, and the suit is instituted on the 6th April 1904 the plaintiff will be entitled to recover the profits received by the defendant from 6th April 1901 to 11th September 1901, the claim for profits received by the defendant from 18th May 1900 to 5th April 1901 will be barred—*Peary Mohan v Khelaram*, 35 Cal 996, *Hays v Padmanand*, 32 Cal 118 *Kishnanand v Parlab*, 10 Cal 785 (P C).

The plaintiff is entitled to recover the rents and profits actually received by the defendant during the three years before suit without reference to the time when the rents fall due. It is the actual receipt of rents, whenever they may have fallen due, which creates the liability—*Abbas v Fasshuddin* 24 Cal 413. Thus, in a suit instituted by the plaintiff on the 1st day of 1301 B S he would be entitled to claim the mesne profits actually received by the defendant during the years 1298—1300 B S. The fact that the rent for the year 1297 would fall due on the 1st day of 1298 would not entitle the plaintiff to claim it unless it was actually received by the defendant during 1298 1300 B S.

463 'Wrongfully'—It has been pointed out in Note 461 above that the receipt of profits by the defendant who has been in possession under a decree of Court (which however is afterwards set aside) is not wrongful.

The receipt of rents and profits by one of several tenants in common on behalf of all cannot be said to be wrongful. It is one of the the ordinary modes of common enjoyment of property—*Yerukola v Yerukola*, 45 Mad 648 at p 667 (F B) 42 M L J 507 A I R 1922 Mad 150.

A wrongful receipt is a receipt by the defendant of profits to which he has no legal title at the time of receipt, or only a title which by a subsequent decree is declared not to be a legal one, but there is no necessity that there should have been any *mala fides* in the receipt by the defendant—*Byjnath Pershad v Budhoo Singh*, 10 W R 486.

A suit was instituted by the owner of a *patni* for recovery of mesne profits against the defendant who had purchased the *patni* at a sale under Reg VIII of 1819 and had been in possession under the purchase which was subsequently set aside. It was held that the defendant wrongfully received the profits which were receivable by the plaintiff but for the illegal *patni* sale, and that Article 109 governed the case and not Article 120—*Peary Mohan v Khelaram*, 35 Cal 996 (1908), 13 C W N 15.

Subsequent to the mortgage decree obtained by the mortgagee, the mortgagor granted a usufructuary mortgage in favour of one A. A entered into possession of the property under it, and realised rents from certain tenants of the property. The plaintiff purchased the property at a sale in execution of the mortgage decree mentioned above, and after obtaining possession of the property through the Court from A, brought a suit against him for recovery of the rents realised by the defendant.

payable by a tenant to a landlord under a contract (express or implied) between them. It does not apply to a suit for compensation against the defendant for use and occupation of the plaintiff's premises where the relationship of landlord and tenant does not exist between the parties. Such a suit is governed by Article 120—*Madar v Kader Mohideen* 39 Mad 54 *Robert Watson v Ram Chand* 23 Cal 799. A suit by an inamdar for arrears of assessment against a person who was not let into possession of the holding under any agreement of tenancy but who held lands in the village is a suit for land revenue and not a suit for arrears of rent (because the relation between the plaintiff and the defendant is not that of landlord and tenant but that of superior holder and inferior holder) and is not governed by this Article but by Art 120—*Sadashiv v Ram Krishna* 25 Bom 556 (558). This Article does not apply where the Government has assigned a right to receive assessment and the assignee sues for it—*Kasturi v Ananaram* 26 Mad 730.

Where rent is assigned by the landlord to a third party it does not lose its character as such and a suit by the assignee to recover rent falls under this Article—*Siris Chandra v Nasim Quasi* 27 Cal 827 (F B) 4 C. W. N 357 *Sheikh Munsar v Loke Nath* 4 C. W. N 10 *Gajadhar v Thakur Prasad* 1 P. L. J. 506 38 Ind Cas 102.

A suit to recover *miras* or customary dues to a *Chattram* claimed by the plaintiff not as rent due to landlord but as moiety recoverable by custom does not fall under this Article but under Art 120—*Venkataramayya v District Board* 16 Mad 305.

Road cess payable to the landlord by the tenant is regarded as rent—*Nabin v Bansinath* 21 Cal 722. Where *dak cess* is claimed under the contract by which rent is payable it must be regarded as part of the rent—*Watson v Sree Kristo* 21 Cal 132. *Chaukidary tax* is rent when such tax is legally recoverable—*Assanulla v Tirthabasi* 22 Cal 680.

A suit by the Zamindar to recover *jodi* and road cess from the defendant who held the land on service inam under him subject to payment of *jodi* as well is a suit under this Article as *jodi* is favourable rent—*Samba sadasiva v Maddulappa* 74 Ind Cas 968 A. I. R. 1924 Mad 73 1923 M. W. N. 524.

466 When the arrears become due.—When a lease provides that the rent should be paid in four instalments on four specific days in the year the period of limitation begins to run from the date on which each instalment falls due and not from the last day of the agricultural year—*Gajadhar v Thakur Prasad* 1 P. L. J. 506.

The rent becomes due not always necessarily on the close of the period in respect of which it is to be paid. It may be due on a different time according to Legislation or custom or express contract or the special circumstances of the case. Thus if before the institution of a suit for rent it is necessary for the landlord to take proceeding under the Madras Rent Re

covery Act (VIII of 1865) to enforce acceptance of the *patta* and to have the proper rate of rent ascertained the period of limitation in a suit for arrears of rent runs from the date of final decree determining the rent and not from the close of the year for which the rent is payable because no rent can be said to be due under this Article until the rate has been finally ascertained by the decree of the Civil Court. The word rent means ascertained rent—*Rangayya v Bobba Srinamulu* 27 Mad 143 (150 151) P C. *Syed Ghulam v Shumugam* 34 Mad 438 (441). Prior to the Privy Council ruling in 27 Mad 143 it was held in some Madras cases that the cause of action accrues on the date on which the rent is payable by custom or contract irrespective of whether a *patta* has been tendered or a suit to enforce acceptance of *patta* under the Madras Rent Recovery Act is pending—*Humarasami v President District Board of Tanjore* 27 Mad 248 (249) *Rangayya v Venkata* 22 Mad 249 (Note) *Srinamulu v Subbanna* 19 Mad 21. These cases are now overruled by the above Privy Council case.

In 27 Mad 143 cited above the Privy Council have pointed out that legislation custom or express contract or the special circumstances of any case may make rent become due at a point of time different from the close of the period in respect of which it is to be paid and that in India, by custom of the country agricultural rents are often payable before the close of the fash year. Thus where according to custom the *maiveram* is due immediately after the harvest is gathered when the share of the land lord is divided from the tenants share that is where the rent is ascertained and is payable on some date before the close of the fash year the period of limitation does not run from the close of the fash year but runs when the rent is ascertained as soon as the harvest is reaped. Nor does the period of limitation in such a case run from the tender of the *patta* because here there is no dispute as to the amount of rent payable and consequently the tender of the *patta* is not necessary for the ascertainment of rent but merely a condition precedent to the institution of the suit for arrears of rent under the Rent Recovery Act—*Arynachellam v Kadir Rowthen* 29 Mad 556 (557) distinguishing *Rangayya v Bobba Srinamulu* 27 Mad 143 (P C).

The condition of tendering a *patta* which was necessary before the institution of a suit under the Madras Rent Recovery Act 1865, has now been dispensed with by the Madras Estates Land Act (II of 1908). Under this Act the landlord is entitled to maintain a suit for rent without tendering a *patta*. The limitation for a suit for rent is three years from the time when it accrues due and it accrues due when it is payable according to the contract between the parties or according to usage—*Saivucherla Veerabhadra v Ganta Kumari* 22 M L J 451 15 Ind Cas 393 *Kanthimathi v Muthusami* 37 Mad 540 (543).

Where it is necessary that the amount of rent should be fixed by the Deputy Commissioner under sec 65 (4) (d) of the C P Land Revenue

Act, no arrears of rent become due until the amount has been finally determined by proper proceedings between the parties. Limitation runs from the date on which the rent is thus finally determined and not from the close of the year for which it is payable—*Ragunath v Sarva* 7 N L R 169

A temple was the owner of the melvaram in certain lands and a mutt was the owner of the kudivaram therein liable to pay the melvaram to the temple. The defendant was both the head of the mutt and the trustee of the temple until he was removed from the trusteeship by the Court which appointed the plaintiff as the receiver. The receiver sued to recover from the defendant as the head of the mutt the arrears of melvaram due to the temple, that had accrued during the defendant's trusteeship. The defendant pleaded limitation. Held that so long as the defendant was both head of the mutt and the trustee of the temple (i.e. so long as the same person was the landlord and the tenant) there was none to sue for rent consequently limitation did not run and no arrears became due during that period; and the arrears became due within the meaning of this Article only when there was some one to whom they were payable i.e., when a different person (the plaintiff) was appointed as the receiver of the temple—*Annamalai v Gobinda Rao*, 46 Mad 579 (582) 44 M L J 318 72 Ind Cas. 5, A I R 1923 Mad 461

467. Registered kabuliāt —A suit to recover arrears of rent due under a registered agreement has been held by the Calcutta Bombay, Madras and Patna High Courts to be governed by Art 116 and not by Art 110—*Umesh v Adarmans*, 15 Cal 221 *Ambalavana v Vaguran* 19 Mad 52, *Vythesinga v Thelchanamurti*, 3 Mad 76 *Mackenzie v Rameshwar*, 1 P L J 37, 34 Ind Cas 754, *Ramanadhan v Achuta*, 23 Ind Cas 753, *Lalchand v Narayan*, 37 Bom 656 The Allahabad High Court held, such a suit to be governed by Art 110—*Jaggilal v Sriram*, 34 All 464 (465), 16 Ind Cas 146, *Ram Narain v Kamla* 26 All 138 but the Allahabad ruling must now be deemed to have been overruled by the Privy Council in *Tricomdas v. Gopinath*, 44 Cal 759 (P C.), 25 C. L. J. 279 which has now definitely settled the question by holding that in case of a registered lease, the limitation for a suit for rent is six years under Article 116.

A suit to recover royalty, if it is based on a registered kabuliāt, would be governed by Article 116 and not by Article 110—*Tricomdas v Gopinath* Jws 44 Cal 759 (P C.), *Peary Lal v Madhoy*, 17 C. L. J 372, 19 Ind Cas 865

468 Rent suit under Bengal Tenancy Act —A rent suit brought under the *Bengal Tenancy Act* (VIII of 1885) is always governed by the three years' rule of limitation according to Sch III of that Act, whether the kabuliāt be registered or not; the Limitation Act will not apply to a suit—*Iswari v. Crawdy*, 17 Cal 469, *Mackenzie v. Haji Syed*, 19 1 (F B); *Kali Charan v Harendra*, 4 C L J. 553.

A lease for building purposes and for establishing a coal depot or for establishing a godown and not for agricultural or horticultural purposes does not come under the Bengal Tenancy Act and a suit for rent based upon such a lease if registered will be governed by Art 116 of the Limitation Act—*Raniganj Coal Association v Jadoonath* 19 Cal 489 *Umrao v Mahomed* 27 Cal 205 *Ahmed v Bisin* 11 Ind Cas 6

Where rent is assigned by the landlord to a third party Art 110 of the Limitation Act and not Art 2 Sch III of the Bengal Tenancy Act would govern a suit brought by the assignee for the arrears of rent—*Mahendra v Kailash* 4 C W N 605 *Ahmedulla v Kaminudin* 2 Ind Cas 989 *Gajadhar v Thakur Pershad* 1 P L J 506 38 Ind Cas 102 *Hayat Majid v Hazari Lal* 63 Ind Cas 424 (Pat)

111 —By a vendor of immoveable property for personal payment of unpaid purchase money	Three years	The time fixed for completing the sale or (where the title is accepted after the time fixed for completion) the date of the acceptance
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469 Change —The first column in the Act of 1877 ran thus By a vendor of immoveable property to enforce his lien for unpaid purchase money

But it was held by the High Courts of Bombay Madras and Allahabad that a suit by the vendor to enforce his lien or charge on the property for his unpaid purchase money fell under Article 132 and not Art 111—*Virchand v Kumari* 18 Bom 48 *Chunilal v Bas Jethi* 22 Bom 846 *Hari Lal v Muhammad* 21 All 454 *Munirunnissa v Akbar* 30 All 172 *Rama Krishna v Subramania* 29 Mad 305 F B (overturning *Natesan v Soundra* 21 Mad 141 *Subramania v Poovan* 27 Mad 28 and *Atuthala v Dayamma* 24 Mad 233) In the light of these decisions the Article has been changed into its present form and it is now applicable only to suits in which the vendor claims to recover the money from the vendee personally

If the personal remedy is barred under this Article the vendor is still entitled to enforce his charge within 12 years under Article 132—*Bashir Ahmed v Nazir Ahmed* 43 All 544 (545) *Meghraj v Abdullah* 12 A L J 1034

112 —For a call by a company registered under any Statute or Act	Three years	When the call is payable
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470 A suit brought not by the company but by the official liqui

dator, after the winding up of the company, is not governed by this Article but by Art 120—*Parell Spinning and Weaving Company v Maneck Haji*, 10 Bom 483

A clause in the Articles of Association of a company provided "Any member whose shares have been forfeited shall notwithstanding be liable to pay and shall forthwith pay to the company all calls owing at the time of the forfeiture and the directors may enforce the payment thereof as they think fit" The defendant a shareholder did not pay calls and therefore his shares were forfeited, and the company filed a suit to recover the calls according to the above clause *Held* that there was a special contract whereby the defendant agreed that in the event of his shares being forfeited he would be liable to pay to the company all the moneys that were due from him for calls, and the cause of action arose when the company forfeited the shares, therefore the present suit to recover what was due from the defendant on his shares was within time if brought within three years of the date of forfeiture that being the date on which the calls were payable within the meaning of this Article—*Habib Rowji v. Aluminium & Brass Works Ltd*, 49 Bom 715, 27 Bom L R 574, 88 Ind Cas 96, A I R 1923 Bom 321

113 —For specific performance of a contract.	Three years	The date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused
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471, Suit based on award —An award is not a contract. No doubt an award springs out of an agreement to submit to arbitration (and there may also be an implied agreement to abide by the decision of the arbitrators) but the award itself is a decision and not a contract. Therefore a suit for possession of land based on an award of arbitrators cannot be regarded as a suit for the specific performance of a contract, and Article 113 cannot apply to such a case. The suit falls under Article 144—*Sornavali v Muthayya*, 23 Mad 593 (596), *Sheo Narain v. Beni Madho*, 23 All 285 (287); *Bhajahari v Behary Lal*, 33 Cal 881 (883, 885). Where an award declares that A is to retain possession of certain property as security for the sum of Rs 150 and that the other co sharers of A are entitled to recover this property on payment of the sum of Rs 150 to A, a possessory charge is created in favour of A by the award, and a suit to redeem the charge is governed by the 12 years' rule of limitation, and not by Article 113 as the award is not a contract—*Surat Singh v Umrao*, 20 A L J 61. A I R 1922 All 410

So also, a suit for recovery of a certain sum of money

A lease for building purposes and for establishing a coal depot or for establishing a godown and not for agricultural or horticultural purposes, does not come under the Bengal Tenancy Act, and a suit for rent based upon such a lease if registered will be governed by Art 116 of the Limitation Act—*Ranigunj Coal Association v Jadoonath*, 19 Cal 489; *Umrao v Mahomed* 27 Cal 205 *Ahmed v Biptin*, 11 Ind Cas 6

Where rent is assigned by the landlord to a third party, Art 110 of the Limitation Act, and not Art 2 Sch III of the Bengal Tenancy Act would govern a suit brought by the assignee for the arrears of rent—*Mahendra v Kailash*, 4 C W N 605, *Ahmedulla v Kamnudin*, 2 Ind Cas 980, *Gajadhar v Thakur Pershad*, 1 P L J 506, 38 Ind Cas 102, *Hayat Majid v Hazari Lal*, 63 Ind Cas 424 (Pat)

111.—By a vendor of im- moveable property for personal payment of unpaid purchase- money	Three years.	The time fixed for com- pleting the sale, or (where the title is ac- cepted after the time fixed for completion) the date of the accept- ance.
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469 Charge.—The first column in the Act of 1877 ran thus "By a vendor of immoveable property to enforce his lien for unpaid purchase money"

But it was held by the High Courts of Bombay, Madras and Allahabad that a suit by the vendor to enforce his lien or charge on the property for his unpaid purchase money fell under Article 132, and not Art. 111—*Virchand v Kumari*, 18 Bom 48; *Chunilal v Bai Jethi*, 22 Bom 846, *Har Lal v Muhammad*, 21 All. 454; *Munirunnissa v. Akbar*, 30 All. 172; *Rama Krishna v Subramania*, 29 Mad 305 F B (overruling *Natesan v Soundra*, 21 Mad 141, *Subramania v Poovan*, 27 Mad 28 and *Anuthala v. Dayamma*, 24 Mad 233) In the light of these decisions the Article has been changed into its present form, and it is now applicable only to suits in which the vendor claims to recover the money from the vendee personally.

If the personal remedy is barred under this Article, the vendor is still entitled to enforce his charge within 12 years under Article 132—*Bashir Ahmed v. Nazir Ahmed*, 43 All 544 (545); *Meghraj v. Abdullah*, 12 A. L. J 1034

112.—For a call by a com- pany registered under any Statute or Act.	Three years.	When the call is payable
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470 A suit brought, not by the company, but by the official liquidator

dator, after the winding up of the company, is not governed by this Article but by Art 120—*Parell Spinning and Weaving Company v Maneck Haji*, 10 Bom 483

A clause in the Articles of Association of a company provided "Any member whose shares have been forfeited shall notwithstanding be liable to pay and shall forthwith pay to the company all calls owing at the time of the forfeiture . and the directors may enforce the payment thereof as they think fit." The defendant, a shareholder did not pay calls and therefore his shares were forfeited, and the company filed a suit to recover the calls according to the above clause *Held* that there was a special contract whereby the defendant agreed that in the event of his shares being forfeited he would be liable to pay to the company all the moneys that were due from him for calls, and the cause of action arose when the company forfeited the shares, therefore the present suit to recover what was due from the defendant on his shares was within time, if brought within three years of the date of forfeiture, that being the date on which the calls were payable within the meaning of this Article—*Habib Rowji v. Aluminium & Brass Works Ltd*, 49 Bom 715, 27 Bom L R 574, 88 Ind Cas 96, A. I R. 1925 Bom 321

113.—For specific performance of a contract.	Three years	The date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused.
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471, Suit based on award:—An award is not a contract No doubt an award springs out of an agreement to submit to arbitration (and there may also be an implied agreement to abide by the decision of the arbitrators) but the award itself is a decision and not a contract Therefore a suit for possession of land based on an award of arbitrators cannot be regarded as a suit for the specific performance of a contract, and Article 113 cannot apply to such a case The suit falls under Article 144—*Sornavalu v. Muthayya*, 23 Mad 593 (596); *Sheo Narain v Beni Madho*, 23 All 285 (287); *Bhajahari v. Behary Lal*, 33 Cal 881 (883, 885). Where an award declares that A is to retain possession of certain property as security for the sum of Rs. 150 and that the other co sharers of A are entitled to recover this property on payment of the sum of Rs 150 to A, a possessory charge is created in favour of A by the award, and a suit to redeem the charge is governed by the 12 years' rule of limitation, and not by Article 113 as the award is not a contract—*Sural Singh v. Umrao*, 20 A L J. 611, A I R 1912 All. 410.

So also, a suit for recovery of a certain sum of money based on an

award which decides the plaintiff's title to the money is not a suit for specific performance of a contract and is governed by Article 120—*Kuldip v Mahan Dube*, 34 All 43 (48), 8 A. L. J 1138, 11 Ind Cas 705 (doubting *Sukho Bibi v Ram Sukh* 5 All 263 and *Raghobar v Maian*, 16 All 3), 1 *Radha Kishen v Delhi Cloth Mills*, 32 P R 1913, 16 Ind Cas 804; *Rajmal v Maruti* 45 Bom 329 (335 336), see also *Fardunji v Jamsetji* 28 Bom 1

A suit to enforce an award even though it is signed by the parties, is not a suit based on a contract. The award is none the less an award and does not become a contract when signed by the parties. Consequently Article 123 or 125 does not apply to the suit—*Harbhaj Mal v. Diwan Chand*, 102 P R 1915. But in another Punjab case it has been remarked that if the parties sign the arbitrators award in token of their acceptance and thus merge the award into a new contract between themselves the claim may be regarded as one for compensation for breach of contract within the meaning of Article 125—*Radha Kishen v Delhi Cloth Mills*, 32 P R 1913. But this remark was merely an obiter, because the parties did not sign the award in this case.

But where the award does not merely decide the right or title of the parties but distinctly provides for something to be done, a suit based upon the award is virtually one to enforce specific performance of the thing to be done and Art 113 would apply. For instance where the award declared that in accordance with a compromise entered into between the parties they should transfer different portions of the disputed property to each other a suit by one of the parties to recover the property agreed to be transferred to him would be governed by Art 113 and not by Art 144—*Talewar v Bahori* 26 All 497 (499). But this ruling has been doubted in 34 All 43 (46 47).

472 Suits based on sale.—A suit for specific performance of a contract for the sale of immoveable property and for possession is governed by this Article and not by Art 144 because the suit is essentially one for specific performance and the right to possession is merely dependent on the right to specific performance—*Muhtuddin v Maylis* 6 All 231.

Once there is an agreement to sell immoveable property, and the vendee has done his part of the contract by paying the purchase-money, the vendor is bound to do everything necessary in order to complete the title of the vendee by executing a registered deed of conveyance under Sec 54 of the Transfer of Property Act. A suit by the vendee for execution of such a conveyance is governed by this Article—*Mya Bin v Maung Kya* 33 Ind Cas 761 (Bur). *Maung Le Dun v Ma Le*, 9 Bur L T 86.

On the date of sale of certain immoveable property, the vendor had not been in possession but his title to possession had been adjudged by a decree against which an appeal was pending. The conveyance did not contain any express covenant to deliver possession to the purchaser. After

the vendor obtained possession, a suit by the vendee for possession was governed by Art 136 or 144, and not by this Article—*Skeo Prasad v. Udas*, 2 All 718.

After the sale of a house by the defendant's father to the plaintiff's father, the former remained in possession according to an agreement in the sale-deed (dated 1880) promising to vacate the house at the end of two years from the date of sale. But the defendant's father, and after his death, the defendant, continued to be in possession of the house, and in 1893 the plaintiff brought a suit for possession of the house. Held that the suit was essentially a suit for possession to which the 12 years' rule of limitation would apply under Art 139 or 144, and not a suit for specific performance of a promise to vacate the house, to which Article 113 might apply—*Shivrudrappa v. Balappa*, 23 Bom 283 (1886).

Under a decree against the plaintiff's father certain villages were sold in 1883 and were purchased by the first defendant as the agent of, and at the request of, the plaintiff's father. Afterwards in 1888 the defendant agreed in writing to convey those lands to the plaintiff upon payment of Rs 99000. The plaintiff brought a suit in 1900 for declaration of title to and possession of those villages upon payment of such sum as may be fixed by the Court. The High Court decided that the first defendant was a trustee for the plaintiff's father and the suit was one brought by a beneficial owner for possession on payment of such sums as were due, and was not barred by any rule of limitation. But it was held by the Privy Council that the agreement of 1888 was a contract for sale and the suit was one for specific performance of the contract under Article 113—*Subbaraya v. Rajah of Karvetnagar*, 45 Mad 642 (P C), 37 C L J 426, 68 Ind Cas 172, A I R 1922 P C 345.

473 Other suits.—Where a person who has agreed to execute a lease fails to do so, a suit by the promisee for specific performance of the agreement (i.e. demanding execution of the lease) is governed by this Article, and limitation runs from the refusal of the defendant to grant the lease—*Satya Kinkar v. Rajah Sri Sri Shiba Prasad*, 4 P L J. 447 (1952).

Where the defendant agreed to give half of the land to the plaintiff who was to help him in recovering it, and then refused to give half of the land after recovery, held that this was a suit for specific performance of a contract, and limitation ran when the defendant refused to deliver the land—*Shriram v. Badaji*, A I R 1923 Nag 47, 71 Ind Cas 40.

A suit by the mortgagor against the mortgagee under a registered mortgage for the balance of the consideration payable by the latter to the former, and for damages in the shape of interest for non-payment of the amount in time, is a suit for compensation for breach of contract in writing registered and is governed by Art 116, such a suit is not one for specific performance of a contract under Art 113—*Naubat v. Indar*, 13 (204).

A Zemindar granted a lease of certain *chaukidari chakran* lands to the lessee. But subsequently the lands were resumed by the Government in consequence of which the lessee lost possession. Many years after the lands were again made over to the Zemindar by the Government. The lessee thereupon brought a suit to recover possession of those lands from the Zemindar. *Held* that the suit was a suit for possession and not one for specific performance of a contract because there was no agreement in the lease to grant a *patni* of these lands to the lessee in case the lands were made over to the Zemindar after resumption—*Banzari Mukunda v Bidhu Sundar* 35 Cal 346 349 (dissenting from *Ranjit Singh v Radha Charan* 34 Cal 564) *Ranjit Singh Bahadur v Maharaj Bahadur Singh* 46 Cal 173 181 (P C)

A deed of exchange contained a covenant that each party would make good any loss caused to the other in case the latter was dispossessed from the lands he got in exchange by reason of want of title of the former. The plaintiff in a suit to which the defendant was a party was declared not to be entitled to a portion of the land received from the defendant in exchange. The defendant refused to give the plaintiff other land in place of the land so lost to him. Thereupon the plaintiff sued the defendant for the recovery of equivalent land. *Held* that the suit was one for specific performance of the agreement contained in the exchange and was governed by this Article the cause of action accruing from the date of defendant's refusal—*Hari v Raghunath* 11 All 77 (F B). But where A and B exchanged lands under a registered deed which contained the following clause

There is no dispute in respect of the said lands if disputes should so arise the respective party should be answerable to the extent of his private property and A being deprived of some of the lands he got by the exchange sued B on the above covenant for the value of the lands of which he was dispossessed. *Held* that a suit for failure to pay money according to contract should be regarded as a suit for compensation for breach of contract and not as a suit for specific performance. The suit therefore did not fall under Article 113 but under Article 83 read with Art 116—*Srinivasa v Rengasami* 31 Mad 452 (453). Where the parties to a deed of exchange expressly covenanted that if there should arise any dispute in the matter of enjoyment of the property exchanged each should return to the other what is taken and then in execution of a decree obtained by a third party against the defendant some of the lands obtained by the plaintiff were sold away whereupon the plaintiff sued the defendant to recover possession of the lands given by him to the defendants. *Held* that the suit was not one for specific performance of a contract under Article 113 but a suit for possession governed by Article 143—*Srinivasa v Johnsa Routher* 42 Mad 690 (671)

A transaction whereby certain shares in a company were allotted to the defendant on the understanding that the latter was to transfer the

shares to the plaintiffs on their paying him a certain sum of money, does not constitute a trust in favour of the plaintiffs for any specific purpose, but an agreement which can be specifically enforced and a suit for such specific performance by compelling the registration of the shares in the plaintiff's name falls under Art 113—*Ahmed v Adjein* 2 Cal 323

A compromise effected in the course of a litigation between the parties is not a contract (just as an award is not a contract) and a suit for recovery of possession of land based on such compromise is not a suit for specific performance of a contract but a suit for possession of immoveable property, and would be governed by Art 144 not by this Article—*Bells v Mahomed Ismail*, 25 W R 521 *Basherszar v Debi Prakash* 20 P R 1913, 19 Ind. Cas 411

473A Registered contract —A suit for specific performance of a registered contract does not fall under Article 116 because that Article refers to suits for compensation for breach of contracts in writing registered, and does not apply to suits for specific performance of such contracts—*Srinivasa v Rengasami* 31 Mad 452 (453)

474 Starting point of limitation —In a suit for the specific performance of an agreement entered into in 1858 to grant pattah when required, it appeared that the plaintiffs applied to the defendants for a pattah in 1874, and in March 1875 the defendants finally refused to make the grant, and the plaintiffs thereupon instituted their suit for specific performance; it was held that limitation ran from the date (1875) when the plaintiffs had notice that their right was denied—*New Deerbhoom Coal Co v Dulooram*, 5 Cal 175

Where the plaintiff was entitled to get a transfer of a decree from the 1st defendant in case the 2nd defendant paid the 1st defendant a certain sum of money within six months from the date of the agreement, and the 2nd defendant so paid the money, it was held, in a suit brought by the plaintiff for the specific performance of the contract to transfer, that as no specific date was fixed for performance, the second clause of third column applied, i e, limitation ran from the date of refusal by the 1st defendant to perform the contract, and not from the date of payment by the 2nd defendant—*Venkanna v Venkata Krishnayya*, 41 Mad 18 (22), 33 M L J 35, 41 Ind Cas 807

Under the second clause of the third column of this Article, specific demand by the plaintiff is necessary to make the date of refusal the starting point—*Virasami v Ramasami*, 3 Mad 87 In the absence of a date fixed for performance of the contract, time does not continue to run until there has been a demand and refusal—*Ma Ma Gye v Ma Nyo Po*, 1 Bur L J. 171, A I R 1923 Rang 44

Although a suit for specific performance may be brought within three years from the accrual of the cause of action, still if the plaintiff is guilty of laches in bringing his suit within that time (e g if the suit is bro

on the very last day of limitation) the Court exercising its discretion with which it is vested under the Specific Relief Act may think it right to dismiss the suit—*Mokund Lal v Chotay Lal* 10 Cal 1061 (1068)

114—For the rescission of a contract	Three years	When the facts entitling the plaintiff to have the contract rescinded first become known to him
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475 This Article refers to the rescission of contracts as between promisors and promisees and not to suits by third parties to have the instrument of contract cancelled or set aside such suits being governed by Art 91—*Bhawani v Bisheshwar* 3 All 846 The last remark is in correct for Article 91 does not apply to a suit brought by a person who was not a party to the instrument sought to be cancelled See Note 420 (4) ante

115—For compensation for the breach of any contract express or implied not in writing registered and not herein specially provided for	Three years	When the contract is broken or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs or where the breach is continuing, when it ceases
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476 Scope of Article —This is a residuary Article in respect of suits on contract and is applicable only when no other Article is appropriate—*Nand Lal v Partab Singh* 3 Lah 326 See also *Johury v Thakoor Nath* 5 Cal 830 (832)

Compensation —For the meaning of the word see notes under section 29

This Article is not limited to the case of damages for breach of contract but it is also applicable to a case of liability under a simple debt due—*Sreenath v Peary Mohan* 21 C W N 479 39 Ind Cas 205 The words compensation for breach of any contract do not restrict the operation of this Article to suits for unliquidated damages for breach of contract but they also include suits for definite sums of money agreed to be paid under any contract (e g a suit against a *del credere* agent for the value of goods sold by him)—*Dukur Pershad v Foolcoomaree* 16 W R (P C) 35 In *Johury v Thakoor* 5 Cal 830 (832) the word compensation was interpreted in the sense of damages and not a specific sum of money payable by the defendant

477. Suits on contracts.—Where the defendant had agreed to pay a certain rate per acre for lands of his which were watered by a canal of the plaintiff, a suit to recover the amount would not be one for rent (as the hire of water would not come within the definition of rent) but would fall under this Article—*Ala v. Sodhi*, 171 P R 1883

On the marriage of his son the defendant caused a sum of money to be set apart in the books of his firm in the name of the first plaintiff, his son, for the purpose of making ornaments for the second plaintiff, his son's wife, but the money so set apart was not to be called for for three years. It was held that the case was not one of trust or of deposit, but one falling under Article 115, that the contract between the parties was that the money should be paid when the plaintiff demanded it after three years, and that the period of limitation therefore ran from the date of the demand which date must be taken as the date of breach of contract—*Manekji v. Nuserwanji*, 20 Bom. 8 (13)

The defendant agreed to sell to the plaintiff certain goods belonging to another person on the implied representation that he had authority from that person to sell those goods, when in fact he had none. He failed to sell those goods to the plaintiff. A suit by the plaintiff for compensation for breach of the contract falls under this Article. It is an action connected with and arising out of contract, and not one arising in tort, and therefore Article 3, does not apply—*Vairavan v. Avicha*, 38 Mad 275 (277)

Where a dispute between the proprietor of certain land and his lessees, with regard to the mineral rights, was settled by a decree in terms of a written compromise entered into by the parties to the suit, under which the lessees were liable to pay to the proprietor a specific royalty on the amount of coal raised, held that a suit for recovery of the royalty was governed by Art. 115 as being a suit based upon the agreement of compromise. The agreement did not cease to be an agreement because it was confirmed by a decree—*Smith v. Kinney*, 2 Pat 749 (752)

After an adjustment of accounts between the landlord (plaintiff) and the tenant (defendant), the defendant was found liable for Rs. 158 on account of rent. It was arranged that the sum of Rs. 136 should be left with the defendant as deposit for payment to the superior landlord on account of rent payable by the plaintiff to the latter, and that the balance was to be paid to the plaintiff. The amount of Rs. 136 not having been paid to the plaintiff's landlord, he sued the plaintiff and obtained a decree for Rs. 225 which was realised from the latter. The plaintiff then brought a suit against the defendant to recover the amount which he had to pay to his superior landlord. Held that by the arrangement between the landlord and tenant for the payment of Rs. 136 to the superior landlord, the amount ceased to be rent, and the claim for recovery of the amount which the plaintiff had to pay to the superior landlord is one for damages

under this Article and not for rent under Article 110—*Lachmi Missar v Deoki Kuar* 19 C W N 174 19 Ind Cas 752

When parties had agreed on the 2nd April 1905 that a settlement of partnership accounts between them should be made upon a certain basis and the final adjustment took place on the 20th August 1906 and entries to that effect were made in the books on that date but not signed by the parties and a suit was brought on the 6th April 1908 to recover the amount due on such adjustment held that the suit was governed by Article 115 or 120 and as the adjustment of 20th August 1906 gave rise to a fresh cause of action from that date the suit was not barred—*Jalim Singh v Choonee Lall* 15 C W N 882 (837) 11 Ind Cas 540

Where a judgment debtor paid a portion of the decree amount to the decree holder out of Court but the latter took out execution without giving credit for it a suit by the judgment debtor to recover the amount paid by him out of Court and for damages is governed by Article 115—*Ganpat v Kirparam* 79 P R 1892 *Gopala Swami v Nammalwar* 36 M L J 176 48 Ind Cas 810

A suit by a broker to recover commission on certain sales is governed by this Article it is not a suit for wages governed by Art. 102—*Sushil v Gauri* 39 All 81 (84)

A suit by a purchasing agent for money due for the purchase of stores for Government is governed by this Article—*Doya Narain v Secretary of State* 14 Cal 256

Articles 115 and 116 are meant to particular and specific contracts that are broken A suit under sec. 235 of the Indian Companies Act by an official liquidator against the auditor and the directors calling upon them to make good a large sum of money on the ground that as between themselves they have allowed the money of the Company to be mis spent is not governed by Article 115 or 116 but by Art. 120—*In re Union Bank* 47 All 693 23 A L J 473 A I R 1925 All 519

As to suits against a carrier for compensation for nondelivery or short delivery of goods see Notes 309 and 312 under Articles 30 and 31

A suit for damages for use and occupation against a tenant holding over may fall under this Article—*Madar v Kader Mowdeen* 39 Mad 54 (56)

Suit for money lent — A suit to recover money lent with interest upon a verbal agreement that the loan should be repaid within one year is governed by this Article—*Rameshwar v Ram Chand* 10 Cal 1033 *Ramasami v Muttusami* 15 Mad 380 See these cases cited under Article 57

Suit for Malikana — A suit for *malikana* where the plaintiffs do not seek to enforce the charge upon the land is governed by Art. 115 in as much as the claim in such a case arises out of a quasi contract created by law—*Kallar v Ganga* 23 Cal 998 If the suit is one to enforce the charge on the land Art. 132 would apply

A suit for compensation for wrongfully withholding payment of makhana is governed by Art. 115: the plaintiff is entitled to damages upon each annual sum in arrears only for three years prior to suit—*Mahamaya v Ramthela*—21 C L J 694 15 Ind Cas 611

Suit against surety—A borrowed a sum of money from the plaintiffs on a promissory note payable on demand and the defendant had guaranteed the repayment of the loan if A made default in payment. It was held that the suit against the surety fell under this Article and the cause of action arose on the same date as it arose against the principal debtor, viz the date of execution of the promissory note—*Brojendra Kishore v Hindusthan Co-operative Insurance Society* 44 Cal 978 *Sreenath Roy v Peary Mohan*, 21 C W N 479 25 C L J 91 39 Ind Cas 205

Breach of implied contract—The expression 'implied contract' is used in this Article in the sense in which it is understood in English law. The Contract Act and the Limitation Act are not statutes *in pari materia*, and it should not be assumed that Article 115 is confined to cases of what would be implied contracts according to the definition given in sec 9 of the Contract Act. The result of confining it to such cases would be that where a suit is instituted against the principal and an agent together and relief is claimed against them in the alternative according as the act was authorised or not by the principal, a different period of limitation would be applicable against each of them, though the obligation arises out of the same transaction. This could not have been intended by the legislature—*Vairam v Leitcha*, 38 Mad 275 (278). See this case cited *ante*

Where a doctor is engaged to treat a patient without any arrangement being made at the time as to his fees, there is an implied contract, an action for breach of which is governed by this Article—*Hurish v Brojonath*, 13 W R 96

A suit by some of the proprietors of a village against the *lambardar* for an account of the profits of the village is governed by this Article, or Article 89 and not by Art 120, because in so far as the proprietors permit the *lambardar* to collect rents and manage the village on their behalf, he is an agent and is as such bound by an implied contract to render an account at the end of each agricultural year. Limitation runs from the date when the account ought to have been rendered under the implied contract—*Anantram v Ganeshram*, 4 P L J 301 (305), 51 Ind Cas 733

The plaintiff sued the defendant who had married the plaintiff's deceased brother's widow, to recover, by way of compensation, the money expended by his deceased brother's family on the marriage, founding his claim upon a custom of the Jats of Ajmere, whereby a member of that community marrying a widow is bound to recoup the expenses incurred by her deceased husband's family on his marriage. It was held that this was a suit for compensation for breach of an implied contract, and it fell under this Article—*Madda v Sheo Bahsh*, 3 All 385

478 Successive breaches —In a suit for breach of a contract to be performed at different times, the period of limitation must be calculated from each breach of contract as it arises. Where there is a contract for performing certain duties in each of several years, each breach of the contract is a complete cause of action, and damages are recoverable for each separately—*Mahī Sahī v Forbes*, 6 W R, Act X, 61

Upon failure to pay the principal and interest upon the day appointed for such payment, a breach of the contract to pay is committed, and the fact that the money subsequently remains unpaid does not constitute successive breaches within the meaning of this Article—*Mansab Ali v Gulab Chand*, 10 All 85

Successive breaches happen in those cases only in which there is a promise to perform periodically, such as payment of rent or of annuity, continuing breach applies only to contracts obliging one of the parties to adopt some given course of action during the continuance of the contractual relation—*Raghubar v Jay Raj*, 34 All 429 (431), U N Mitra's Limitation, p 304

Where a decree-holder does not certify a payment made to him out of Court by the judgment-debtor, and applies for execution without giving credit for such payment, a suit by the judgment-debtor for any damage he may have suffered by the decree holder's neglect to certify and by the proceedings in execution, is one for breach of the implied promise to certify the payment to Court and is governed by this Article. The filing of the execution petition in itself gives a cause of action, though no money may have been realised, and successive applications will give rise to successive breaches and fresh causes of action. If money is subsequently realised, that will give rise to a further breach of the covenant and a fresh cause of action—*Gopalasami v Nammalvar*, 36 M L J 176, 48 Ind Cas 810

479 Continuing breach —Where the lessor fails to give delivery of possession of a portion of the land demised to the lessee on account of the obstruction by a person claiming under a paramount title, the breach, whether it be considered as a breach of a covenant to deliver possession or of a covenant for quiet enjoyment, occurs once for all on the date of failure to deliver possession, and is not continuing but complete and final, consequently, the period of limitation for a suit by the lessee for damages for breach of the covenant commences to run from the date of such failure and not from the close of the term of the lease—*Secretary of State v Pemmaraju*, 40 Mad 910 (919), 30 M L J 575, 35 Ind Cas 254

116.—For compensation	Six	When the period of limitation would begin
for the breach of a	years.	to run against a suit
contract in writing		brought on a similar
registered.		contract not registered.

479A Scope —The Limitation Act has drawn a broad distinction between unregistered and registered instruments. The words 'not specially provided for' which occur in Article 115 do not find a place in Article 116, and the conclusion is that if the instrument is registered Article 116 will apply in spite of the fact that a special provision has been made in some other Article in respect of a similar instrument not registered. Therefore a suit to recover royalties due under a registered lease is governed by Article 116 and not by Article 110—*Tricomdas v Gopinath*, 44 Cal 759, 767 (P C)

The word 'compensation' in this Article need not be restricted to a suit for unliquidated damages and can be held to include a claim for a sum certain—*Ganappa v Hammad* 49 Bom 596 A I R 1925 Bom, 440.

The word 'contract' in this Article means a contract 'express or implied', the words 'express or implied' used in Article 115 should be read into Article 116. It will therefore include an *implied* contract, e g a covenant of title which is implied in a deed of sale under sec 55 (2) of the Transfer of Property Act. A suit by the vendee for return of purchase money owing to the defect of title of the vendor is governed by this Article—*Ganappa v Hammad*, (supra) See Note 484 below

480 Registered contract —It was held in an earlier Madras case that the word 'registered' in this Article must be read as defined in the General Clauses Act, sec 3 (45). Under that section the term 'registered' includes documents registered under any special law, such as the Companies Act, Copyright Act, as well as documents registered under the Registration Act. Therefore, a suit by a shareholder against a company registered under the Companies Act to recover dividends was governed by this Article as the right to the dividends arose out of the *contract* between the shareholders and the members of the Company which is embodied in the registered memorandum and articles of association—*Ripon Press and Sugar Mill Co Ltd v Venkatarama*, 42 Mad 33 (34, 35), 35 M L J 253, 48 Ind Cas 903. But this decision has now been overruled by the Full Bench case of *Rama Seshayya v Tripurasundari Cotton Press*, 49 Mad 468, 50 M L J 520, 94 Ind Cas 515, A I R 1926 Mad 615, (Full Bench Reference on appeal from 46 M L J 563, A I R 1924 Mad 721), where it has been held that the relation between a shareholder and the company is not a *contractual relation*, and a suit by a shareholder of a limited Company for recovery of arrears of dividend is a claim for a *debt*, and as the Limitation Act does not specially provide for such suit, Article 120 would apply. The Judges of the Full Bench also expressed the view that the word 'registered' in this Article should be interpreted in the ordinary sense of registration under the Registration Act, and the deposit of the Memorandum and Articles of Association with the Registrar of Joint Stock Companies did not amount to registration.

A *fortiori*, a suit, not by a shareholder but by a purchaser in Court auction of the shares of a company, to recover the arrears of dividends in respect of those shares is governed by Article 120, and not by Article 116—*Ibid*

481 Suit on registered bond —A suit is none the less a suit for compensation for breach of contract in writing registered within the meaning of this Article although it has been brought for recovery of a specified sum of money on a registered bond or other contract—*Gonesh v Madhavrao*, 6 Bom 75, *Ram Narain v Adindra* 17 C W N 369, *Nabacoomar v Siru Mullick* 6 Cal 94, *Girijanand v Saulajanand*, 23 Cal 645 (at p 663) *Ethel Kerr v Clara Ruxton*, 4 C L J 510, *Husain v Hafiz*, 3 All 600 *Khunni v Nassruddin*, 4 All 255, *Gouri v Surju* 3 All 276 *Magaluri v Narayan* 3 Mad 359, *Challaphroo v Banga* 20 C W N 408, 22 C L J 311, *Seshayya v Annamma* 10 Mad 100, *Rathnasami v Subramanya* 11 Mad 56, *Ram Buxh v Moghar* 1881 P R 86, *Collector of Etawah v Bais Maharani* 14 All 162; *Nistarsani v Chandi* 12 C L J 423, *Susil v Gauri*, 39 All 81

This Article applies to a suit against an infant on a registered bond given for necessities but in such a case it is requisite that the consideration for which the bond is given should be proved, and then the bond becomes a registered contract which binds the infant—*Sham Charan v Choudhury Debya*, 21 Cal 872

482 Suit on instalment bond —This Article is applicable to a suit on a registered instalment bond, notwithstanding the express provisions of Art 74. The present Article is intended to apply to all contracts in writing registered, whether there is or is not an express provision in this Act for similar contracts not registered—*Din Dayal v Gopal*, 18 Cal 506, *Rup Narayana v Gopi*, 11 C W N 903

483 Suit on mortgage —In a suit by a mortgagee against the mortgagor, this Article and not Art 132, is applicable, so far as the right to recover money against the mortgagor personally is claimed—*Raghubar v Lachmin*, 5 All 461 (462), *Kameshwar v Raj Kumari*, 20 Cal 79 at p 84 (P C), *Rathnasami v Subramanya*, 11 Mad 56 (59), *Rahmat v Abdul*, 34 Cal 672 (675); *Ram Narayan v Nand Kumar*, 25 O C 164, *Ram Narain v Adindra*, 17 C W. N 369, *Dinkar v Chhaga ilal*, 38 Bom 177 (181) Thus, where the mortgagee at first brings a suit for sale on a mortgage, but the mortgaged property being found to be inalienable, he claims a simple money decree, the suit falls under Art 116—*Thamman v Daichand* 9 O L J 171, A I R 1922 Oudh 113 In *Lalubai v Naran* 6 Bom 719 F. B (overruling *Pestonjis v Abdul Rahman*, 5 Bom 463) it was held that a suit for a simple money decree on a mortgage was governed by Article 132 But this Bombay Full Bench case must be deemed to have been overruled by the Privy Council case of *Ramdin v Kalka*, 7 All 502 in which their Lordships have laid down that Article 132 applies only to suits

brought for money charged upon immoveable property for the purpose of recovering it out of the property so charged

In this Privy Council case (at p 505) the Judicial Committee had made an inadvertent remark that a suit for recovery of money personally from the mortgagor (under a registered mortgage) must be brought within the same period of limitation as a suit on a bond for money viz three years. This ruling cannot be supported and from the fact that no cases are referred to in the judgment it would appear that none were cited in the argument and that the Privy Council consequently were not aware of the current of decisions in India.—Starting 5th Ed p 363 In the Bombay case of *Dinkar v Chhaganlal* 38 Bom 177 (181) Shah J observes With regard to the observations of *Ramdin v Kalka* I may say that having regard to the facts of that case the only point which arose for decision was whether for the purposes of personal liability the period of 12 years under Art 132 applied to the case There was no point in that case as to whether the period of limitation would be three years or six years Therefore the observations in the case of *Ramdin v Kalka* about the shorter period of three years being applicable were not necessary for deciding the appeal As the observations in the case of *Kameshwar v Raj Kumari*, 20 Cal 79 (84) 19 I A 234 are in consonance with the current of decisions of the Indian Courts and in conflict with the dictum in the case of *Ramdin v Kalka* I think it would be proper to accept the view which has found favour with the Indian Courts

A usufructuary mortgage contained a stipulation that if the mortgagor failed to deliver possession the mortgagee might bring the mortgaged property to sale Possession of the property not having been delivered, the mortgagee brought the mortgaged properties to sale and as the sale of the property did not satisfy the mortgage-debt he applied for a personal decree (under sec 90 Transfer of Property Act) Held that in order to find whether the application for personal decree is maintainable the Court will have to see whether the suit was brought within the period of limitation prescribed by this Article If the suit for sale of the mortgaged property had been brought within six years of the expiry of the term of the mortgage the amount sought to be recovered by the personal decree was legally recoverable—*Sheo Chara v Lalji* 18 All 371 (372) *Jangsi Singh v Chaudar* 30 All 388 (389)

Even though a mortgage-deed contains no express personal covenant to pay the debt still a personal covenant is implied in and is an essential part of every simple mortgage and a suit for personal remedy against the mortgagor is governed by this Article—*Jangsi Singh v Chaudar* 30 All 388 389 (dissenting from *Sawaba v Abaji* 11 Bom 475)

Where a mortgage-deed is executed by the father in a Mitakshara joint family under circumstances that it is not binding on the sons the mortgage cannot be enforced against the mortgage security the

gagee would be entitled only to a money-decree against the sons, and the suit falls under this Article—*Surja Prasad v Golab Chand*, 27 Cal 762 (767) But if it is executed under circumstances that the debt becomes binding on the sons (i.e. if the debt is incurred for the purposes of the family, and not for immoral purposes) it will be enforceable against the estate, and the suit will undoubtedly fall under Article 132—*Maheswar v Kishun Singh* 34 Cal 184 (190)

When a mortgagee is deprived of his security, under a decree of a Civil Court, he is entitled to proceed personally against the mortgagor, such a suit is governed by Article 116, and limitation runs from the date of deprivation of the security and not from the date of the mortgage—*Maung Yan v Maung Po* 3 Rang 60, 89 Ind Cas 56, A I R 1925 Rang 223

Where a registered instalment mortgage bond contained a covenant that in case of default in payment of an instalment the mortgagee would be entitled to take possession and that if there be failure in delivering possession, the mortgagee would be entitled to recover the entire amount from the person or the mortgaged property or the other property of the mortgagor, a suit to recover the mortgage money personally from the mortgagor upon failure of the mortgagor to pay an instalment was a suit for compensation for breach of contract under this Article and was in time if brought within 6 years from the date of the default—*Collector v Dawan* 30 All 400 (402) An instalment mortgage bond executed in 1909 provided that the mortgage amount was to be repaid by nine annual instalments and contained a stipulation that if there was default in the payment of any instalment the mortgagee would be entitled to demand the full amount secured by the bond Default was made in the very first instalment in September 1909 and the mortgagee brought the present suit on 13th January 1920 (i.e. more than 6 years after the first default) to recover the money personally from the mortgagor Held that the suit was not barred in respect of the instalments that fell due within six years of the date of the suit, viz the instalments from September 1914 to 1917 The fact that the suit was not brought within six years from the first default did not bar the entire claim, because it was left to the option of the creditor to demand the entire amount on default of payment of an instalment and it was not obligatory on the creditor to bring a suit for realisation of the entire amount as soon as any of the instalments fell due—*Ramsekhar v Mathura* 4 Pat 820, 90 Ind Cas 249, A I R 1925 Pat 557

A suit by a usufructuary mortgagee for refund of the mortgage money on account of the mortgagor's failure to put the mortgagee in possession of the property is a suit for breach of the mortgagor's liability to give possession, imposed by sec 68 of the Transfer of Property Act, and is governed by this Article—*Umichaman v Ahmed*, 21 Mad 242

A suit by a mortgagor to obtain from the mortgagee the amount expressed in a registered mortgage-deed to have been advanced but which was

not paid by the mortgagee, together with damages for non-payment, is governed by this Article and not Art 113 because the withholding of payment of the mortgage money by the mortgagee to the mortgagor would amount to a breach of contract, and the suit to recover the money is nothing other than a suit for compensation for damages caused by the breach of contract, and in the absence of any specific provision to the contrary, time will run from the date of execution of the mortgage-deed—*Naubat v Indar*, 13 All 200 (204)

If a mortgage-deed is registered by a Registering Officer within whose jurisdiction the mortgaged property is not situate, the deed will be treated as a simple registered money bond, and a suit for money based upon the bond will fall under this Article—*Joginee v Bhoop*, 29 Cal 654 (663)

Interest after due date —Where there was no stipulation in a mortgage-deed to pay interest after the day fixed for the repayment of the mortgage-money, it was held by the High Courts in India that the mortgagee could not claim *interest* after the time fixed for repayment of the mortgage-money, but could claim only *damages* in lieu of interest as long as the mortgage money remained unpaid after the due date, that the damages were not a charge on the mortgaged property under article 132, and that a suit for the recovery of such damages fell under article 116 and must be brought within six years from the due date of the mortgage—*Bhagwant v Daryao*, 11 All 416 (420), *Narindra v Khadim Hossein* 17 All 581 (587), *Gudri Koor v Bhubaneshwari*, 19 Cal 19 (25), *Golam Abbas v Mahomed Jaffer*, 19 Cal 23 (Note), *Badi Bibi v Sami Pillai* 18 Mad 257 (262), *Thayar v Lakshmi*, 18 Mad 331 (334), *Mansab Ali v Gulab Chand*, 10 All 85 A Full Bench of the Calcutta High Court has laid down that though a mortgage bond contains no stipulation for payment of interest after the due date, the mortgagee is entitled to *interest* for six years. That is, the Court awarded *interest* (and not merely *damages*) but held that the claim for interest was governed by Art 116—*Moti Singh v Ramohari*, 24 Cal 699 (F B) at p 703

But the question has been settled by the Privy Council in the case of *Mathura Das v Raja Narindar*, 19 All 39 50 (P C), 23 I A 138, (on appeal from 17 All 581) where their Lordships held that even though the mortgage-deed did not expressly stipulate for payment of interest after due date, the mortgagee was entitled to claim post-diem interest as *interest* (and not merely damages) and that the claim for such interest was not governed by Article 116 (but by Art 132). In this case the mortgage was dated 17th February 1880, and the mortgage money was payable with a certain rate of interest 'within a year'. The mortgagee sued on his mortgage in June 1890. Their Lordships held that the mortgagee should be granted the usual mortgage-decree for the principal with *interest to the date of the decree*. The Calcutta High Court has also held in ,

case that although there is no stipulation for payment of interest after the due date of the mortgage the Court is entitled to allow interest at reasonable rate after the due date under the provisions of the Interest Act until the final order for sale. And this interest is to be recovered from the property in the same way as the mortgage money—*Bikramji v Durga Dayal* 21 Cal 274 (278). That is Art 132 would apply to the claim for interest.

A mortgage bond stipulated that interest at a certain rate should be paid annually and there were no words limiting this liability to the time fixed for the payment of the principal. It appeared from the evidence that interest had been paid for several years after the due date. It was held that the interest was a charge on the property, and that the claim for interest fell under Art 132—*Vithoba v Vigneshwar* 22 Bom 107 (110, 111).

484 Breach of covenant of title.—Where the vendor sold under a registered sale-deed a property of which he was not in possession and even afterwards failed to secure possession to the purchaser owing to his (vendor's) defect of title held that a covenant of title being implied in every transaction of sale under sec 55 of the Transfer of Property Act the failure to give possession to the purchaser must be regarded as a breach of contract in writing registered and a suit by the purchaser for refund of his purchase money would be governed by this Article—*Krishnan v Kannan* 21 Mad 8. *Ganappa v Hammad* 49 Bom 596 A I R 1925 Bom 440 89 Ind Cas 59. Where a sale-deed contained an express covenant that in the event of the purchaser losing part of the property sold owing to defect of title of the vendor or to any other cause he would be entitled to a refund of the proportionate part of the purchase money a suit for such refund upon failure to get possession of a part of the property was governed by Art 116 and not by Art 97—*Mul Kunwar v Chaltar Singh* 30 All 402. Similarly where a sale deed set out that the property was unencumbered and there was a covenant that if the purchaser was dispossessed of any part of the property he would get a refund of a proportionate part of the purchase money a suit for such refund upon his being dispossessed of a part of the property by a prior incumbrancer fell under this Article and not Art 97 and must be brought within six years from the date of dispossession—*Ram Jaggi v Kauleshar* 30 All. 405 (Note). A registered deed of sale executed in 1905 recited: "If there is any dispute in respect of the property by relations and others we (vendors) shall settle them at our own expense and we shall be bound to carry out this sale without obstruction. The son of one of the vendors sued to set aside the sale as regards the share of his father and obtained a decree in 1913 for possession of that share. Thereafter a suit was brought by the vendee in 1917 for the recovery of the part of the purchase money corresponding to the share of the property lost to him. Held that the suit was one for compensation for —

breach of covenant of title and was governed not by Article 97 but by Article 116 the period of limitation ran from the date when the covenant was broken (the date of the decree of 1913 or the date of dispossession in pursuance of that decree) and the suit was not barred—*Sisila Subbayya v Pacha Pitchanna* 43 M L J 64 68 Ind Cas 190 A I R 1923 Mad 28 See also *Arunachala v Ramasami* 38 Mad 1171 *Kasturi Naicken v Venkatasubba* 1 M L J 162 *Varayana v Pedda Rama* 1 M L J 479, *Pirbhui v Baisrai* 11 N L R 186 *Chidambaram v Sivathasan* 15 M L J 376 *Ramdhan v Purshottam* 22 N L R 49 A I R 1926 Nag 109 *Mulla v Mal v Bidhumal* 45 Bom 955 (960) *Sigamani v Munibadra* 49 M L J 668 If the vendee is dispossessed by virtue of a decree, limitation runs from the date of the decree of the first Court and not from the date of decree of the Appellate Court—*Sigamani v Munibadra* (supra)

The defendant as the Karnavan of a tarwad executed for consideration an *ekrar* granting a license to the plaintiff for cutting trees in a forest belonging to the tarwad In a subsequent suit it was decided that the *ekrar* was not binding on the tarwad and the plaintiff was restrained from cutting trees The plaintiff thereupon sued to recover the money advanced under the *ekrar* Held that as the license was neither a sale nor a lease of immoveable property within the definition of those terms under the Transfer of Property Act a covenant for title and quiet enjoyment could not be implied under sec 55 (a) or section 108 (c) of that Act and consequently the suit could not be treated as one for compensation for breach of a registered contract under section 116 but that the suit fell under Article 62 or 91—*Vammakutti v Pishakhal* 29 Mad 353 (357 358)

485 Suit on sale-deed —Where a registered deed of sale contained a covenant that if the land actually conveyed proved to be less than the land purported to be conveyed or if the profits of the property proved to be below a certain amount stated in the deed of sale the seller would refund a proportionate amount of the purchase money a suit for such refund was held to fall under this Article and not under Art 65—*Kishen Lal v Kinloch* 3 All 712 *Amanat v Ajudhia* 18 All 160

On a sale of immoveable property the vendees covenanted with the vendors to pay a portion of the consideration money to the mortgagee of the vendors but they did not pay in accordance with the covenant in consequence of which the mortgagee sued the vendors upon his mortgage and obtained a decree The vendors however did not pay any money under the decree They then brought this suit against the vendees for compensation for breach of the covenant It was held that the suit was maintainable and it was not necessary that the vendors should have suffered any loss (i.e. should have paid any money under the decree) before they could bring their suit that the suit was governed by Article 116 and as no time was specified in the sale-deed for payment

by the vendees to the mortgagee, limitation began to run from the date of the execution of the sale-deed—*Raghubar v. Jaij Ray*, 34 All 429 (431)

See also *Abdul Aziz v Md Bahsh*, 2 Lah 316, cited in Note 401 under Art 83

486 Suit on exchange-deed —Where a registered exchange-deed contained a covenant to indemnify, in case of either party being deprived of the property acquired by exchange, the case was governed by Article 83 read with Article 116, and a suit brought by the plaintiff within six years from the date of his being deprived of some of the lands, was within time—*Srinivasa v Rangasami*, 31 Mad 452

487 Suit on lease —A suit to recover damages for breach of covenant of a lease, the terms of which were embodied in a registered *pottah*, is governed by this Article—*Girish v Kunjo*, 35 Cal 683 (687)

A suit for damages by the lessee against the lessor for failure on the part of the latter to put the former in possession of the leased premises the lease being registered, is governed by Art 116—*Zamindar of Vinana gram v Behara*, 5 Mad 387 (396)

488 Other suits —

Suit for rent under registered habuliat —See notes under Art 110

Suit for rent under Bengal Tenancy Act —See notes under Art 110

Suit against agent —See notes under Article 89

Suit on registered ekhar —A suit upon a registered *ekhar* executed by the priest of an idol for recovery of arrears of maintenance is governed by this Article—*Girijanund v Sailajanund*, 23 Cal 643

Suit on deed of release —A suit for recovery of certain moveable property (books) under a registered deed of release, executed by the defendant in favour of the plaintiff, in which the defendant acknowledged the books to belong to the plaintiff, fell under this Article—*Rama Nath v Mohesh* 9 C W N 679

Suit for account against partner —A suit for account by one partner against another after dissolution of partnership is governed by Art 106 and not by this Article, even though the deed of partnership is registered—*Vairavan v Ponnayya*, 22 Mad 14 This Article cannot be stretched to cover every case in which the plaintiff's claim may in its origin be referred to a contractual relation which is expressed in a registered agreement—*Ibid*

Suit on account stated —Where a registered partnership contract binds the parties to pay the loss according to their respective shares, a suit to recover the defendant's share of the loss, on a settlement of accounts between the plaintiff and the defendants, is not governed by Article 64 (nor by Art 106) but by Article 116—*Ranga Reddi v. Chinna Reddi*, 14 Mad 465

489 Contract signed by one party —A contract (lease) which has been registered, is to be treated as a contract in writing registered, notwithstanding that it bears the signature of only one of the parties (*viz* the

tenant only) There is no statutory provision requiring the signature of both parties—*Girish v Kunja* 35 Cal 683 (688), *Ambalavana v Vaguran*, 19 Mad 52, *Kotappa v Vallur Zamindar*, 25 Mad 50 *Zamindar of Viranagram v Bekara*, 25 Mad 587

490 Limitation —Limitation runs from the date when the contract is broken, or when there are successive breaches from the date when the breach in respect of which the suit is instituted occurs or when the breach is continuing, from the date when it ceases—*Ram Narain v Adindra*, 17 C W N 369 Upon failure to pay the money due on a bond, there is but one breach of the contract, viz the nonpayment on the date agreed upon, and there is no question of continuing or successive breaches during the time the money remains unpaid—*Bhagwant v Daryao*, 11 All 416 (423), *Mansab v Gulab*, 10 All 85, *Golam v Mahomed*, 19 Cal 23 (Note), *Gudri v Bhubaneswari*, 19 Cal 19 (25) See also 34 All 429 cited in Note 478 under Art 115

A sale-deed was executed in favour of the plaintiffs in 1901 purporting to convey the property free from incumbrances and containing a covenant that should any excess sum be charged against the purchasers, the other properties of the vendor would be liable for the same together with interest and costs At the time of the sale there was a prior simple mortgage existing on the property, and the mortgagee brought a suit for sale in 1912 which was decreed in 1914 But before sale, the plaintiffs paid off the decree in May 1915 and in July 1915 brought the present suit for recovery of the amount which they had paid on account of the mortgage together with interest It was held that the suit was not barred, as the cause of action arose on the date on which the plaintiffs suffered actual loss (May 1915) by reason of being compelled to pay off the decree on the prior mortgage—*Ram Dulari v Hardwar* 40 All 605 (609)

A mortgage was executed in 1899 and part of the consideration money was left with the mortgagee to pay off a prior mortgage, it being agreed that the money was to remain with him and that any interest which might accrue on this sum in future would be entirely upon his shoulders and would have to be paid by him when he paid the money The mortgagee neglected to pay, in consequence of which the prior mortgagee sued and obtained a decree for sale in 1905 and eventually the mortgaged property was sold in 1912 The remaining property was sought to be sold for the balance of the decree money, to avert that sale the mortgagor paid off the amount and then brought the present suit in 1916 to recover damages from the mortgagee Held that in as much under the agreement between the parties the mortgagee had undertaken all responsibility for further interest and could therefore pay the prior mortgage at any time, the cause of action did not accrue on the date of the mortgage in 1899, but arose when the mortgagor was actually damaged in 1912—*Iskri Prasad v Muhammad Sami*, 19 A L J 81, 60 Ind Cas 829

In *Raghubir v Jai Raj* 34 All 429 (see the facts of this case stated at p 41 ante) where the plaintiffs did not suffer any loss (i.e. did not pay any money under the mortgage-deed) and as no time was fixed for payment of the mortgage money by the vendees to the mortgagee of the vendors it was held that limitation ran from the date of execution of the sale-deed. It was further held that the obtainment of the decree by the mortgagee against the vendors did not give them a fresh starting point for limitation. The Judge further remarked that even if the vendors had paid any money to their mortgagee under the mortgage decree it was doubtful whether that would have furnished a fresh cause of action to them. This decision follows the English case of *Battley v Faulkner* (1830) 3 B & Ald 288 22 R R 370 where it is laid down that one breach of contract can only furnish one cause of action and that any consequential damage arising from the breach gives no new cause of action.

117—Upon a fore Six The date of the judgment as years ment defined in the Code of Civil Procedure 1908

118—To obtain a de Six When the alleged adoption that an years tion becomes known alleged adoption is to the plaintiff invalid or never in fact took place

490A Invalid —In some earlier Punjab cases it was held that a distinction should be drawn between a case where an adoption is wholly unauthorised and is therefore an *absolute nullity* incapable of creating any jural relation between the adopter and the adoptee and a case where the act is done with authority but in an improper exercise of that authority and it is in the latter sense that the word "invalid" in Article 118 should be construed. Therefore this Article is inapplicable to a case of *void* adoption (as for instance where the widow adopted without any authority from her husband)—*Kara : Dad v Nathu* 86 P R 1905 (F B) *Bhagat Ram v Gulst Rai* : 144 P R 189 *Mulammad Din v Sardar Din*, 67 P R 1901. These rulings were doubted in a later case of the same Chief Court where it was held that Article 118 applied to every case where the validity of the adoption was the substantial question in issue, and the fact that it was alleged to be invalid or was inherently invalid made no difference in the matter—*Mid Nasruddin v Mid Umar Khan* : P R 1907. The ruling in 86 P R 1905 (F B) has also been disapproved of in *Nathu v Rahaman* 44 P R 1911 11 Ind Cas 11.

491. Suit for possession —

Under the Act of 1871 —Article 129 of the Act IX of 1871, which corresponds to the present Article, ran thus Suit to set aside an adoption—Twelve years—The date of the adoption or (at the option of the plaintiff) the date of the death of the adoptive father The question arose whether the Article applied to a suit for possession It was held by the Privy Council that where the plaintiff could not succeed without displacing an apparent adoption by virtue of which the opposite party was in possession, a suit by the plaintiff for possession fell under that Article The expression 'set aside an adoption' in Article 129 applied indiscriminately to suits for possession and to suits of a declaratory nature, and it did not denote solely a suit of the latter description—*Jagadamba v Dakhina Mohan*, 13 Cal 308 (P C), *Mohesh v Taruck* 20 Cal 487 (P C) It should be noted in this connection that the Privy Council case of *Raj Bahadur v Achumbi*, 6 C L R 12 (in which it was held that Article 129 of the Act of 1871 did not apply to a suit for possession, and which gave rise to a good deal of misconception in Indian Courts) was not a suit to set aside an adoption but was a suit brought by a reversioner for possession and for cancellation of a deed which purported to give an absolute interest to the widow, and the defendant in the suit claimed under an adoption which was one to the widow herself and not to her husband, the Privy Council held that the adoption being void, the plaintiff was entitled to claim possession, ignoring the adoption These decisions under the old law should not be accepted as of any authority under the present Act.

Article 129 of Act IX of 1871 applied to all suits in which the plaintiff could not succeed without displacing an apparent adoption by virtue of which the defendant was in possession That Article prescribed 12 years as the period of time within which a suit to establish or set aside an adoption might be brought, and that such period of twelve years should begin to run from the date of adoption, or (at the option of the plaintiff) from the date of the adoptive father's death Therefore, where no suit was brought by the reversioners to set aside an adoption made by a Hindu widow, within 12 years from the date of adoption, the reversioners were not entitled to bring any further suit after the widow's death to recover the property from the defendants who were in possession by virtue of the adoption, because Act IX of 1871 did not give to a reversioner whose right to sue for possession accrued upon the death of a Hindu widow, any further time than the 12 years given by Article 129 to any plaintiff Although under Article 141 of the Act of 1877 the reversioner might bring a suit for possession within 12 years from the death of the widow, still if the period of limitation prescribed by the Act of 1871 had already expired before the Act of 1877 came into force, it could not be revived by the latter Act—*Vasitha v Srirangath*, 43 Mad 883 (P C), 49 M L J 769, 42 C L.

A I R 1925 P C 249 Thus ruling is of no importance under the present Act

Under the Acts of 1877 and 1908 —It will be seen that the language of the Article under the present Act (which is the same as in the Act of 1877) is entirely different from the language of the Article in the Act of 1871, the period of limitation the date from which it runs, and the description of the nature of the suit have all been changed, and the question is whether the alteration of the language denotes a change of law, in other words whether the present Article will apply to a suit for possession

In a large number of cases of the several High Courts, it has been held that by departing from the language of Art 129 of Act IX of 1871 and by using a language in Art 118 of the Act of 1877 which can only refer to a suit for declaration it is intended that this Article should apply only to suits where such bare declarations are sought for, it does not apply to a suit for possession of property, even though it may be necessary in such a suit to decide that a given adoption is invalid—*Natthu Singh v Gulab Singh* 17 All 167 (171), *Basdeo v Gopal*, 8 All 644, *Radha Dulaiya v Rashik Lal*, 45 All 1 (4) (distinguishing *Chunni Lal v Sila Ram*, 34 All 8), *Baikanta v Kali Charan*, 9 C W N 222, *Ram Chandra v Ranjit* 27 Cal 242 *Lala Parbhu v Mylne*, 14 Cal 401 (417), *Velaga Mangamma v Bandlamudi* 30 Mad 308, *Maharaja of Kolhapur v Sundaram*, 48 Mad 1 *Rama Rao v Venkola*, 17 M L J 282, *Kalandavelu v Arumugatha* 18 Ind Cas 493, *Bhagabat v Murari*, 15 C L J. 97 *Hiralal v Bai Reu*, 21 Bom 376, *Doddawa v Yellawa* 46 Bom 776 (T B), *Shah Deo Narain v Kusum Kumari*, 3 P L J 164, *Surjan Singh v Kharak Singh*, 96 P R 1908, *Naihu v Rahman*, 44 P R 1911, *Watira v Talhu* 96 P R 1893 Thus is the right view of the law and one which has been approved of by the Privy Council in *Tribhuvan v Rameswar*, 28 All 727 (P C) and *Md Umar v Md Niasuddin*, 39 Cal 418 (P C) And this view has now been confirmed by the decision of the Judicial Committee in the recent case of *Kalyandappa v Chandasappa*, 48 Bom 411 (P C), 26 Bom L R 309, 28 C W N 666, 22 A L J 508, 46 M L J 598 where their Lordships have distinctly laid down (at pp 426, 427) that the language of Article 118 of the Acts of 1877 and 1908 is different from the language of Art 129 of the Act of 1871, that the words 'a suit to obtain a declaration' are terms of art and refer to suits under sec 42 of the Specific Relief Act for a declaratory decree that an adoption is invalid or did not take place, and that the Article applicable to a suit for possession of immovable property on the death of a Hindu female is Article 141, even if it is necessary to decide in that suit whether an adoption is or is not valid

But it has been held by some cases of the Bombay and Madras High Courts and the Punjab Chief Court that the altered language has made no difference in the law of limitation, that the present Article applies to every suit for possession in which the validity of the adoption is the sub-

stantial question in dispute, whether such a question is raised by the plaintiff in the first instance, or arises in consequence of the defendant setting up his own adoption as a bar to the plaintiff's success—*Srinivas v Hanmant*, 24 Bom 260 F B (overruling *Fannyamma v Manjanna*, 21 Bom 159), *Srinivas v Barant*, 37 Bom 513 15 Bom L R 533, and that this Article *does* apply to a suit for possession of immoveable property where it is necessary to challenge the validity of an adoption before a right to such property can be established—*Barot Naran v Barot Jessang*, 25 Bom 26, *Chanbasappa v Kalyandappa* 41 Bom 728, *Parvati v Saminatha*, 20 Mad 40, *Gujar Singh v Puran* 71 P R 1901, *Bhupa v Nigahia*, 68 P R 1903, *Ganesha v Nathu* 20 P R 1902, *Ishar v Partap Singh*, 38 P R 1907, *Muhammad Niasuddin v Muhammad Umar*, 1 P R 1907. But all these decisions are opposed to the view taken in the recent Privy Council case of *Kalyandappa v Chanbasappa*, 48 Bom 411, and must now be rejected as incorrect.

Where a suit by the reversioners for recovery of possession of property had become barred in 1874 under Article 129 of the Limitation Act of 1871, and a title to such property had been acquired by the heirs of the adopted son under sec 23 of that Act, it could not be affected by the provisions of the later Limitation Acts of 1877 or 1908—*Somasundaram v Vaidhilinga*, 40 Mad 846 (867).

This Article does not apply where the adoption is made by the widow not to her deceased husband, but to *herself*. Such adoption does not confer any title on the adopted son, and it is not necessary for the reversioner to sue for a declaration of the invalidity of such adoption. He can bring a suit for possession, ignoring the adoption, and such suit does not fall under this Article—*Lachman v Kanhaiya*, 22 Cal 609 at p 614 (P C).

Where the suit is expressly framed as a suit to set aside an adoption and not as a suit for possession, Article 118 applies and not Article 141 or 144—*Ayyadoras v Solai Ammal*, 24 Mad 405 (408).

Adoption challenged on the ground of forgery of anumatispatra—See *Hurri Bhushan v Upendralal*, 24 Cal 1 (P C) cited under Art 92.

492 Limitation.—The cause of action arises from the date on which the adoption became known to the plaintiff, and not from the date of the death of the adoptive father—*Ram Chandra v. Narayan*, 27 Bom 614, *Srinivas v Balvant*, 37 Bom 513. Limitation runs when the adoption becomes known to the plaintiff, and the defendant should prove clearly that the suit is barred by reason of the plaintiff having knowledge of the adoption more than six years before the date of institution of the suit. The fact that the adoption deed was registered does not lead to the presumption that the plaintiff must have had knowledge of the adoption from the date of registration of the adoption deed, as registration is not tantamount to notice, and the plaintiff cannot be expected to go on searching the register from time to time to see whether any registered

affecting his rights has been executed—*Gulam Muhammad v Mirza*, 5 Lah. 368 A I R 1925 Lah 25 84 Ind Cas 174

Where the plaintiff executed a deed of adoption in which he declared that he had adopted a certain boy, and afterwards he brought a suit for a declaration that the adoption deed was void and that the adoption had in fact never taken place the period of limitation for the suit ran from the date of the adoption deed—*Udit Narain v Randhir*, 45 All 169 (176), 69 Ind Cas 171

Where the reversioners of a deceased fail to allow a suit for a declaration of the invalidity of an adoption to become barred by time under this Article they are not entitled to sue for a declaration that a subsequent gift to the adopted son is not binding upon them because that gift does not give them a fresh cause of action in that it does not involve any further denial of the rights of the reversioners than was involved in setting up the adoption in the first place—*Khushal Singh v Nanda* 5 Lah L J 63

493 Effect of limitation.—When an adoption is made by a Hindu widow without authority, it is the duty of the immediate reversioner to bring a suit for declaration within the period prescribed by this Article, and if the immediate reversioner fails to bring a suit within that period, the remote reversioner will also be barred—*Ayyadurai v Solai Ammal* 124 Mad 405 (407) *Chiruvolu v Chiruvolu* 29 Mad 390, 393 411 (F B); *Venkataswayya v Polepeddi Adenna* 39 M L J 621 There is a distinction between a suit to set aside an alienation and a suit to set aside an adoption In suits to set aside alienations by a qualified owner, the immediate reversioner cannot be held to represent the remote reversioners but in suits to set aside an adoption the immediate reversioner ought on principle to be held to represent the remote reversioner so that if the immediate reversioner is barred the remote reversioner is likewise barred The right of each and every reversioner to set aside the adoption cannot be viewed as altogether personal to him—*Chiruvolu v Chiruvolu* 29 Mad 390 (393 411) F B The word plaintiff in col 3 includes a person from or through whom the plaintiff derives his right to sue therefore if the nearest reversioner (e g daughter) is barred, a remote reversioner (e g daughter's son) claiming through the nearest reversioner is also barred—*Ayyadurai v Solai Ammal* (supra) The Privy Council has also laid down in *Venkata narayana v Subbammal* 38 Mad 306 42 I A 125 that a suit by a presumptive reversioner for a declaration that an adoption is invalid is one brought in a representative capacity on behalf of all the reversioners

But lapse of time does not operate to give validity to an invalid adoption; and if no suit is brought by the reversionary heir within six years to obtain a declaration that the adoption is invalid the possession by the alleged adopted son for more than 12 years during the lifetime of the widow will not be adverse to the reversioner, who therefore will not be prevented from bringing a suit for possession under Arts 140 and 141

within twelve years from the date when the widow dies or when the estate falls into possession. The adoption by the widow does not impose upon the reversioner the necessity of filing a suit to have it declared invalid during the lifetime of the widow under pain of losing the inheritance upon the widow's death—*Harilal v. Bai Renu* 21 Bom 376 (379) *Lala Parbhu v. Mjine* 14 Cal 401 (417) *Muhammad Umar v. Muhammad Niazuddin*, 39 Cal 418 (432) P C *Kalyandappa v. Channbasappa* 48 Bom 411 (426), P C *Bhagwat v. Murari* 15 C L J 97 *Bapayya v. Akamma* 36 Ind Cas 355 (Mad). *Rangan v. Mahbub* 55 P R 1897

119—To obtain a Six When the rights of the declaration that an years adopted son, as such, adoption is valid are interfered with

494 Suit for declaration, not for possession.—This Article, like the previous one, applies only to a suit for a bare declaration as to the validity of an adoption, it does not apply to a suit for possession, even though the plaintiff may have to establish the validity of the adoption as the basis of his claim to possession—*Jagannath v. Runji*, 25 Cal 354 (359), *Chandania v. Salig*, 26 All 40, *Lal v. Murhdhar*, 24 All 195, *Padajirav v. Ramrav*, 13 Bom 160, *Arjan Singh v. Lachhman Singh*, 81 P R 1914 (F B) 25 Ind Cas 429 (overruling *Ram Narain v. Maharaj Narain* 3 P R 1904)

But it has been held in a Madras case that where a plaintiff cannot obtain a decree for possession without a decision that an adoption is valid, the suit for possession is governed by Art 119—*Ratnamasari v. Ahilandammal*, 26 Mad 291, (*per* Moore and Benson J J., Bhashyam Ayyanger J dissenting)

A suit by an adopted son for a declaration that a decree which was passed on the basis that there was no adoption is not binding on him, is virtually a suit for a declaration that his adoption is valid, under this Article, because the plaintiff cannot get the declaration he asks for, without establishing the validity of his adoption. The suit cannot be treated as one for possession governed by the 12 years' rule—*Bharma v. Balaram*, 43 Bom 63 (65)

495 Factum and validity of adoption.—This Article applies to all suits, in which either the factum or the validity of the adoption is denied, and the plaintiff will have to prove the factum as well as the validity of the adoption, i.e., he must show, not only that the adoption *in fact* took place, but also that the adoption is *valid*—*Laxmana v. Ramappa*, 32 Bom 7 (dissenting from *Ningava v. Ramappa*, 28 Bom 94, and *Shivram v. Krishnabai*, 31 Bom 80, in which it was held that this Article was restricted to suits in which the question was not as to the *factum* but as to the validity of the adoption) "Unlike Art 118, Art 119 does not separately provide for a suit to obtain a declaration that an adoption *in fact* took place, for the

simple reason that the mere *factum* of adoption will not entitle one to a legal character unless the adoption is also *valid*. A plaintiff therefore will have to sue for a declaration that his adoption is valid, whether the *factum* itself is denied by the defendant or the *factum* is admitted but the validity is challenged"—*Per Bhashyam Ayyanger J* in *Ratnamasari v Ahilandammal*, 26 Mad 291

496 *Interference*—The interference mentioned in the third column of this Article is an interference which must amount to an absolute *denial* of the status of adoption, and an unconditional exclusion from the enjoyment of rights in virtue of that status. This Article can have no application where the interference was of no greater effect than that of merely *postponing* the right of the adopted son to succeed to the property of his adoptive father—*Ningava v Ramappa*, 28 Bom 94 (101) *Maung Gyi v Maung Gaing* 1 Rang 186, 74 Ind Cas 970

The interference need not necessarily be in relation to the very property sought to be recovered in the suit, an interference in relation to property other than that sued for would set time running—*Ahilandammal v Ratnamasari* 13 M L J 145

The interference must have been caused by the defendant in the suit and not by some third person—*Chandania v Salig* 26 All 40

Alienation, by means of a gift, by the adoptive mother, in favour of the daughter, is an interference with the rights of the adopted son—*Ponnammal v Ratnamasari* 13 M L J 144

120—Suit for which no	Six	When the right to sue
period of limitation	years	accrues
is provided elsewhere		
in this Schedule		

497 This is called the 'omnibus' Article of the Limitation Act

This Article is final and residuary, and the Court ought not to regard a case as coming under this Article unless clearly satisfied that it does not come under any of the other Articles dealing with specific cases—*Lala Gobind v Chairman*, 6 C L J 535, *Sharooop v Joggeshur*, 26 Cal 564 (F B), *Mahomed Wahib v Mahomed Ameer*, 32 Cal 527, *Ardikappa v Kondappa*, 9 Bur L T 130, *Chiranjilal v Shish Lal* A I R 1926 Lah 242, 92 Ind Cas 994

498 **DECLARATORY SUITS** —

A suit by the purchasers of certain land who have obtained possession of the land, for a declaration of their right to have the land registered in their name in the revenue records is governed by this Article, not by Art 144—*Bhiskaji v Pandu* 19 Bom 43 (45)

A suit for a declaration that the defendant whose name appeared as lessee in a lease-deed had no interest in the lease and that he was only a

benamidar for the plaintiff, is not one to cancel or set aside the instrument of lease under Art 91, but one to which Art 120 applies, and the cause of action accrues when the plaintiff's position as lessee is challenged—*Basant v Chhiddammī*, 35 All 149 (See this case cited under Article 91)

The plaintiff alleged that he was the proprietor of certain land which one of the defendants had wrongfully mortgaged to the others, and prayed that, the mortgage-deed being set aside, the land might be protected from illegal foreclosure by cancelment of the foreclosure proceedings which had been instituted by the mortgagee. It was held that this was not a suit strictly for cancelling or setting aside the instrument of mortgage to which Art 91 applied, but was rather a suit for a declaratory decree and governed by this Article—*Sobha v Sahodra* 5 All 322. So also, where the plaintiff sued for maintenance of possession in a certain joint-family property by cancelment, so far as his interest was concerned, of a certain deed of sale by which another coparcener in the same property had purported to convey the whole to a stranger, it was held that the limitation applicable to such a suit was that prescribed by this Article and not that prescribed by Art 91—*Din Dial v Hur Narain*, 16 All 73. A land belonging to defendant no 1 was mortgaged by him to defendant no 5 and afterwards the plaintiff purchased it at a sale in execution of a certain decree against defendant no 1, the plaintiff thereupon brought a suit for a declaration that the mortgage was fraudulent and without consideration. Held that the suit fell under Article 120 and not under Article 91—*Pachamuthu v Chinnappan* 10 Mad 213 (See these cases cited under Art 91)

A suit for a declaration that a decree purchased in the name of the defendant who had wrongfully taken out execution of the same had been really purchased by the plaintiff for his own benefit and that the defendant was merely a benamidar, is not a suit for relief on the ground of fraud under Art 95 (as no question of fraud arises in the case) but is governed by this Article—*Gour Mohun v Dinonath*, 25 Cal 49 (51)

A suit by the heir of the founder of a *wakf* for a declaration that an alienation of *wakf* properties by the *mutwalli* is void brought during the lifetime of the alienor, is governed by this Article and must be brought within six years from the date of the alienation—*Maulavi Muhammad Fakimul Haq v Jagat Ballabh*, 2 Pat 391, 4 P L T 675 A I R 1923 Pat 475

A suit for a declaration that an alienation of trust property is invalid and not binding on the trust falls under this Article and not under Article 134 which applies to a suit for recovery of possession of trust properties. Time runs from the date of execution of the sale-deed and not from the time when the plaintiff comes to know of the transfer—*Venkatachell-v Collector*, 38 Mad 1064 (1070).

A suit for a declaration that an alienation made by the karnavan of a tarwad property is not binding on the tarwad, is governed by Art 120 Time runs from the date of the alienation, and not when the plaintiff obtains knowledge of the alienation—*Ottappurakal Thashah v Pallikal*, 33 Mad 31 (33)

A suit by the plaintiffs to follow the estate of their debtor in the hands of the defendant and for a declaration that a mortgage executed by the debtor in favour of the defendant is void as against the creditors of the debtor, is governed by this Article and not by section 10—*Greender v Mackintosh*, 4 Cal 897

A suit by a Mahomedan widow against the brother of her deceased husband for a declaration of her right to inherit and possess the entire estate of her husband (in accordance with a proved local custom) falls under this Article it is not a suit for a distributive share of property within the meaning of Art 123—*Mahomed Riasat v Hasin Banu*, 21 Cal 157, 163 (P C)

In a suit for ejectment in a Court of Revenue against H, he pleaded that he was entitled to remain in possession under a certain *zur* i peshgi lease, the term of which had not yet expired The Court of Revenue treated the question thus raised as falling under sec 199 of the Agra Tenancy Act 1901 and directed H to file a suit in the Civil Court within three months to vindicate his right H instituted the suit in the Civil Court after more than three months *Held* that sec 199 was not applicable and H was not bound to file his suit in the Civil Court within three months from the date of the order of the Court of Revenue This was a suit for a declaration and could be brought within six years of the accrual of the cause of action—*Suraj v Hira* 37 All 94 (96)

Where the suit was in substance a suit for the declaration of the proprietary title of the plaintiff to the land claimed as well as for the correction of the settlement Record, *held* that the plaintiff was entitled to a declaration of his proprietary right, even if his right to demand a correction of the settlement record was lost by lapse of time, *held* also that Art 96 was not applicable to the suit but Art 120—*Taja v Gulam*, 35 P R 1880, *Nathu v Bula*, 27 P R 1881

439 Declaration of possession and title —A suit for a declaration of title to, and of possession in, immoveable property of which the plaintiff is in possession is governed by this Article and not by Article 144—*Rajani v Monaram* 23 C W N 883, *Legge v Rambaran*, 20 All 35 (F B) In the Full Bench case their Lordship said (at p 36)—“There is the widest possible difference between a suit for a declaration such as is asked for in this suit, and a suit for actual possession of immoveable property In a suit to which Art 144 would apply, there must be a prayer, express or implied, for the dispossession of some one from the property or from the interest in it which the suit claims In the present suit the plaintiffs have

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was annually assessed no consequential relief having been sought was held by the Madras High Court to be governed by this Article and not by Art 131 on the ground that the latter Article applied only to those suits which are coupled with a prayer for consequential relief—*Balakrishna v Secretary of State* 16 Mad 294 (295) But this is no longer good law See Note 540 under Article 131

Declaration of heirship —A suit for a declaration that the plaintiff was the daughter and heiress of the last vatandar would be governed by this Article and the plaintiff's cause of action accrues not on the death of her predecessor but on the denial of her status by the defendant—*Tukabai v Vinayah* 15 Bom 422

Declaration of invalidity of marriage —A suit by a Parsi woman for a declaration of the invalidity of her marriage celebrated in her infancy is governed by this Article and limitation runs from the date of her attaining majority—*Bai Shirindas v Kharsheds* 22 Bom 430

500 *Suits by reversioners* —A suit by the reversionary heirs of a *stanom* for a declaration that a *kanom* executed by the person in possession of the *stanom* in favour of the defendant is not binding on the plaintiffs or on the *stanom* is governed by this Article and not by Art 91—*Puraken v Parvalhi* 16 Mad 138 (139)

Where a fraudulent decree is passed against a person in possession with a limited interest the reversioner is not bound to sue for a declaration of the invalidity of the decree It is open to him to wait until the succession falls in and if anything is done thereafter constituting an actual injury to his vested right then to pursue his remedy Therefore where a fraudulent and collusive decree was passed against the widow and after the widow's death the decree holder sought to execute the decree by proceeding to attach the property in the hands of the reversioner (plaintiff) who thereupon sued for a declaration of the invalidity of the attachment held that the suit was governed by Article 120 and was in time if brought within six years from the date of attachment of property in execution of the fraudulent decree though more than six years after the passing of the decree itself because the injury in respect of which it was necessary for the plaintiff to obtain redress was the attachment and not the passing of the decree—*Tallapragada v Borrugapalli* 30 Mad 407 (407 408) dissenting from *Parekh v Bai Vakhat* 11 Bom 119

A suit by the reversioner for a declaration of his title to property sold in execution of a decree against the widow which decree was alleged to be collusive and fraudulent is governed by this Article—*Chhaganram v Bai Motigauri* 14 Bom 512 (514)

A suit brought by the reversioner during the life time of the widow for a declaration that he is entitled to succeed on the death of the widow to property alleged to form part of her husband's estate which property is in the possession of persons who claim it as their own adversely to the

widow is a suit governed by Article 120 and not by Art 125, and time ran from the date when the defendants set up their own right—*Ramaswami v. Thajamma* 26 Mad 488 (490)

A suit brought by a remote reversioner and not by the nearest reversioner for a declaration that an alienation made by a female is valid only during her lifetime is governed by Art 120 and not by Art 125—*Bhagwanta v. Sukhi* 22 All 33 (F B) *Ambar v. Bindrabai* 37 All 195 *Venkata v. Tuljaram* 1917 M W N 30 *Kalathal v. Thirupathi* 10 M L J 229 *Deccaj v. Shro Ram* 70 P R 1914 *Thakar v. Ganesh* 15 P R 1916 *Guntupalli v. Guntupalli* 24 M L J 183 *Suman Singh v. Ullam Chand* 1 Lah 69 *Anandi v. Ram Sahai* 27 O C 173 As regards the time from which limitation runs see Note 509 infra under sub heading Suit by remote reversioner

An alienation made by the transferee from a Hindu female in possession with a limited estate or by a stranger in possession holding under her may furnish the nearest reversioner with a cause of action for a declaratory suit equally with an alienation made by the Hindu female herself To such a suit the limitation applicable is that prescribed by Article 120 and not that prescribed by Article 125 and the cause of action arises on the alienation made by the transferee of the female and not on the transfer by the female herself—*Balbhaddar v. Prag Dat* 41 All 492 (502)

After the death of the widow of a Hindu testator the reversioners may sue for construction of the testator's will and for a declaration of their reversionary rights Such a suit may be brought under this Article within six years from the death of the widow when they become entitled to possession A suit for possession would be governed by Article 141—*Chukhun v. Lolit* 20 Cal 906 (925)

A suit by the reversioner to recover immoveable property on the death of a Hindu female is governed by Article 141 and a like suit in respect of moveable property is governed by Art 120—*Runchordas v. Parbatsai* 23 Bom 725 (P C) *Pramatha Nath v. Bhuvan Mohan* 49 Cal 45 25 C W N 585 64 Ind Cas 980

A suit by a reversioner to restrain waste of moveable properties by the widow and praying that the properties be handed over to a receiver appointed for the purpose of preventing further waste of the properties and that the donees from the widow be directed to replace any part of the property that can be traced in their hands is governed by this Article and time runs from the date of transfer by the widow—*Venhanna v. Narasimham* 44 Mad 984 (987)

501 Pre-emption of mortgaged property —Where a mortgage by conditional sale had been duly foreclosed under Reg XVII of 1806 it was held in a suit for pre-emption of the mortgaged property that Article 10 did not apply because the property was already in the hands of the vendee mortgagee and there was no registered deed of sale

suit fell under Article 120, and the plaintiff's right of pre-emption accrued and limitation began to run against him on the expiration of the year of grace and not from the date of the order of foreclosure—*Atlar Singh v Ralla Ram*, 103 P R 1901 (F B), *Sheoji Singh v Sheoji Singh* 129 P. R 1906, *Bahadur v Alsa*, 30 P R 1907; *Ali Abbas v Kalka* 14 All 405 (412) F B (overruling *Prag Chaubey v Bhajan*, 4 All 291, *Rasik Lal v Gajraj Sing*, 4 All 414, and *Udit v Padarath*, 8 All 54, where it was held that limitation ran from the date of the foreclosure-decree giving formal possession to the mortgagee) A suit to declare a right of pre-emption against the heir of a mortgagee by conditional sale who has foreclosed under Reg XVII of 1806 is governed by this Article, where the subject of sale does not admit of physical possession and there is no registered deed of sale Neither Article 10 nor Art 144 applies to the case Limitation begins to run from the date of expiry of the year of grace, that being the date when the mortgagee's right becomes mature—*Batul v Mansur*, 20 All 315 (F B), affirmed by the Privy Council in 24 All 17 (26).

Where a mortgage by conditional sale of a share in an undivided zamindary village (which is not capable of physical possession), is foreclosed by proceedings taken under the Transfer of Property Act, the period of limitation for a suit for pre-emption runs under this Article from the date when the mortgagee obtains an order absolute for foreclosure under sec 87 of the Transfer of Property Act, and not when the mortgagee makes his application for an order absolute under sec 87 nor from the date fixed in the decree under sec 86 as the date on which the payment is to be made by the mortgagor—*Rahim Illahi v. Ghasila* 20 All 375 (377 378), *Anwar-ul Huq v Jwala Prasad*, 20 All 358 (361)

502 Suit on an award —A suit to enforce an award, whether the same is signed by the parties or not, is governed by Art 120 It cannot be treated as a suit on a contract The fact that the award is signed by the parties makes no difference, the award is none the less an award, and does not become a contract when signed by the parties, and Art 113 or 115 would not apply—*Harbhag Mal v Dwanchand*, 102 P. R 1915. A suit to recover money, based on an award of arbitrators, is governed by Article 120 and not by Article 113—*Rajmal Girdharlal v Maruti*, 45 Bom 329 (335) See Note 471 under Article 113

503 Suit for injunction —A suit for a perpetual injunction to restrain the defendant from preventing the plaintiff from entering a certain house falls under this Article; therefore, if it is found that the defendant had been in exclusive possession of the house for more than six years, the suit is barred—*Kanakasabas v Mufsu*, 13 Mad 445.

A suit by the lessor for an injunction to restrain the lessee from interfering with the lessor's rights under a covenant in the lease to enter upon the land demised and to cut and take away certain trees, is governed by

this Article and not by Article 113 142 or 144 as none of those articles applies to a suit for injunction—*Wasran v Babu Lal* 26 All 391 (393)

A suit for an injunction directing the defendants to close some windows newly opened by them on a partition wall falls under this Article and must be brought within six years from the date of opening of the windows—*Imambhai v Rahim Bhai* 49 Bom 586 27 Bom L R 503 A I R 1925 Bom 373 87 Ind Cas 977

504 Suit for compensation money —Where a land was acquired under the Land Acquisition Act but the Collector refused to award any compensation a suit to recover compensation would be governed by this Article and the right to sue accrued either from the date of the acquisition or the refusal by the Collector to award compensation Art 17 or 18 had no application to the case—*Raneshwar v Secretary of State* 34 Cal 470 *Mantharapadi v Secretary of State* 27 Mad 535 See notes under Arts 17 and 18

505 Suit by principal against agent or his representatives —A suit by principal against agent for account and for recovery of any money found due on taking accounts is governed by Art 89 but so far as it seeks to obtain certain account papers from the agent the suit is governed by Art 120 the cause of action arising from the date when such papers are to be submitted according to the contract between them—*Madhub v Debendra* 1 C L J 147

A suit by the principal to recover money from the legal representatives of the agent is governed not by Article 89 but by this Article—*Kumeda v Asutosh* 17 C W N 5 16 Ind Cas 742 *Rao Gurray v Raghunath* 31 All 479 *Seth Chand Mal v Kallan Mal* 95 P R 1886 *Fatima v Intari* 1 P R 1917 13 Ind Cas 930

506 Suit in respect of trusts —A suit for enforcement of the plaintiff's personal right to manage the trust property is not a suit to recover the properties for the purposes of the trust consequently section 10 can not apply and the suit is governed by this Article—*Balwant v Puran* 6 All 1 (P C)

A suit to recover property settled on invalid trust would fall under this Article and not under section 10 The period of limitation commences from the time when the property was transferred to the trustees because in the case of invalid trusts a resulting trust in favour of the donor accrues immediately the subject of the trust is transferred to the trustees and the right to sue for it arises at once It cannot be said that the right to sue arises only when the trustees refuse to recognise the resulting trust—*Cowasji v Rustamji* 20 Bom 511

A suit by a trustee to recover the advances made by him to meet the expenses of the trust during his trusteeship is governed by Art 120, and not by Art 132 and the period of limitation runs from the time he ceases to be the trustee, i e when he is judicially declared to be

the trustee or when he is dispossessed of the trust estate in pursuance of the judicial declaration. Limitation cannot run until there is a successor whom the plaintiff can sue, unless he can sue his successor there can be no right of suit and therefore limitation cannot start running—*Abhan Sahab v Soran*, 38 Mad 260 (264, 265), 28 M L J 347, 28 Ind Cas 290

A suit by the deceased shewait's son to recover the advances made by the deceased shewait to meet the expenses of the debutter estate at a time when he had been wrongfully kept out of the office by the defendant, is governed by this Article. The cause of action accrued when the plaintiff's father died, and not when the advances were made—*Peary v Narendra*, 37 Cal 229, 234 (P C)

Suit for improper management of trust funds—The defendant neglected to purchase properties with the surplus income of a mosque as required by the trust deed. A suit was brought by the Advocate General (under section 92 of the Civil Procedure Code, 1908), and it was claimed in that suit that the defendant should be charged with interest on the uninvested funds, so as to make up for the loss of rent which would have been recovered if properties had been purchased. It was held that the claim fell within this Article and was barred except as to six years prior to the filing of the suit—*Advocate General v Moulavi Abdul Kadir*, 18 Bom 401 (424)

507. *Suit against son to enforce father's debts*—A suit against the son to enforce the liability under the Mitakshara Law to pay the father's debt, on the ground of the pious obligation of the son under the Hindu law to pay the debt due by the father is governed by this Article, whether the debt is based on a bond—*Narsingh v Lalji*, 23 All 206 (208), or on a mortgage—*Brijnandan v Bidya Prasad*, 42 Cal 1068, at p 1092 (F B), *Maharaj v Balwant*, 18 All 508 (516) or on a decree obtained against the father—*Persasami v Seetharama* 27 Mad 243 (246, 254) F B, *Ramayya v Venkataratnam* 17 Mad 122 (129), *Natasayyan v Ponusami* 16 Mad 99 (101). In the Madras Full Bench case, the Judges expressed the opinion that if the suit were brought upon the original cause of action, i e., upon the original debt due by the father, the Article of Limitation applicable would have been the same as against the father, i e. Article 52 and not Article 120—27 Mad 243, at pp 246, 254

In case of a bond executed by the father, time ran when the bond became payable—*Narsingh v Lalji*, (supra), in case of a mortgage executed by the father, the period ran from the due date of payment of the mortgage money or from the date of the father's death—*Maharaj v Balwant*, (supra), and in case of a suit to enforce against the sons the decree-debt due by the father, time runs from the date of the father's death—*Natasayyan v Ponnu sams*, 16 Mad 99 (at p 102). If the decree passed against the father had provided for payment of the money by instalments, time begins to run (in the suit against the sons) from the date on which each instalment becomes due—*Ramayya v Venkataratnam*, 17 Mad 122 (129).

A suit by the principal to recover money from the sons and grandsons of the agent on the ground of their pious liability is governed by this Article and the cause of action accrues on the death of the agent—*Rao Girraj v Raghuvir*, 31 All 429 (438)

508 Other suits —*Right to worship idol* —A suit for declaration of an exclusive right to worship an idol is not a suit to establish a periodically recurring right under Article 131 but is governed by this Article—*Eshan Chunder v Monmohini* 4 Cal 683 (685)

Value of goods misappropriated —Certain goods of the plaintiff which remained with the defendant's brother had been appropriated by the latter to his own use. After his brother's death, the defendant sold the goods and held the proceeds as the agent of the widow of his deceased brother. Plaintiff brought the suit to recover the money from the defendant. Held that neither Article 43 nor 61 applied to this suit. The suit was one to enforce an equitable claim on the part of the plaintiff to follow the proceeds of his goods in the hands of the defendants and that Article 120 applied, there being no other Article applicable to the case—*Gurudas v Ramnarayan*, 10 Cal 865 (P C)

Recovery of security deposit —Where A made a deposit as security for the discharge of his duties as manager of an estate which deposit was liable for all sums not accounted for by him and a suit was after his dismissal from appointment, brought by him for the recovery of the deposit, it was held that this Article applied to the case, and time began to run not from the date of his dismissal but from the time when the account of charges due against the deposit was made and sent in to him—*Upendra Lal v Collector*, 12 Cal 113 (115)

Ousting a shibait —A suit to oust a shibait from his office, the appointment to which is not hereditary but has been made by nomination is one for which no period of limitation is specially provided and is therefore governed by this Article—*Jagannath v Birbhadra* 19 Cal 776 (779)

Enforcing charge against moveable property pledged —In a suit on a pledge of certain moveable property given by the defendant as security for a loan of money, the plaintiff prayed for a decree for the money against the defendant personally, and also prayed that the charge might be enforced against the property pledged. It was held that the prayer for a personal decree was governed by Art 57, but so far as the plaintiff sought to enforce his charge against the property pledged, the suit fell under Article 120—*Nimchand v Jagabundhu*, 22 Cal 21 (24), *Madan v Kanhai* 17 All 224, *Mahalinga v Ganapathi*, 27 Mad 528, at p 530 (F B). The plaintiff who had lent money on the security of eight black buffaloes and by his suit to enforce payment of the money charged upon them and did not seek to get a personal decree against the debtors was governed under this Article—*Deokinandan v Gopua*, 16 A L J 42

A decree is a moveable property, and a hypothecation

is therefore a hypothecation of moveable property, governed by Art 120. But where the decree is converted into immoveable property, that is, where the mortgagor-decreeholder purchases certain immoveable property of his judgment-debtor in satisfaction of the decree, the mortgagee becomes entitled to the substituted security and also to the larger period of limitation provided by Art 132—*Jamna Dei v Lala Ram*, 39 All 74 (78)

Recovery of instalments of profession tax—A suit for recovery of instalments of profession tax under the provisions of the Madras Towns Improvement Act, 1871, is governed by this Article—*President of Municipal Commission v Srihukulipu*, 3 Mad 124

Apportionment of rent—A suit by a tenant against his landlord for apportionment of the rent payable to such landlord for the portion of land obtained by the landlord on partition out of what had theretofore been held by the tenant under all the co sharers jointly, is not a suit for abatement of rent but for apportionment of rent and for a declaration that after the partition the share of the rent which the plaintiff is liable to pay to the defendant is as it is stated in the plaint, there being no special provisions for a suit of this description it is governed by this Article—*Durga v Ghosla* 11 Cal 284 (286) But a suit by the holder of one share against the holders of other shares in an roam land included in a single *patta* and assessed in an entire sum, for apportionment of the assessment, cannot be barred by this Article or by any other Article of the Limitation Act So long as the joint liability lasts, each is entitled to claim an apportionment, and such claim can no more be time barred than a claim for rent so long as the title to the land is not extinct The suit is not therefore barred even if it is brought more than six years after the date of an order of a revenue officer making previous apportionment of the assessment as such order cannot be treated as conclusive—*Ananda v Vayyanna*, 15 Mad 492 (493 494)

Under sec 315 C P C for recovery of purchase money—No special period of limitation was fixed for suits brought under sec 315 C P C 1882 (O XXI, r 93 of the present Code) for recovery of the purchase money paid by the plaintiff, on the ground that the judgment-debtor possessed no saleable interest in the property in question, and therefore this Article applied to those suits—*Nilkanta v Imamsahib*, 16 Mad 361. But according to the Calcutta High Court, the suit was held to be governed by Article 62—*Ram Kumar v Ram Gour* 37 Cal 67 (70) Under the Code of 1908, the law has been materially altered, and the remedy of the auction-purchaser who seeks to recover purchase money under O 21, r 93, on the ground that the judgment-debtor had no saleable interest in the property, is not by a *suit*, but by an *application*, and such application is governed by Article 181—*Makar Ali v Sarfuddin*, 27 C W. N 183 50 Cal 115 (122) But where the execution sale took place and was confirmed before the new C. P Code of 1908 came into operation, and the auction purchaser brought

a suit after the passing of the C P Code of 1908 to recover the purchase money held that the right of the purchaser to maintain the present suit must be determined with reference to the Code of 1882 when the sale took place and was confirmed and that right was not extinguished by the promulgation of the Code of 1908. The suit was therefore governed by Article 120 of the Limitation Act of 1877—*Ibid*

Where upon a sale being set aside at the instance of the judgment-debtor under sec 311 C P Code (1882) a suit is brought under sec 315 C P Code, by the auction purchaser for recovery of a sum of money from a person who had after the sale and the deposit of the money in Court attached that sum in execution of his decree against the judgment-debtor as representing the surplus sale proceeds belonging to the original judgment-debtor after satisfaction of the decree obtained against the debtor by the decree holder the suit is governed by this Article—*Anurita Lal v Jogendra* 40 Cal 187 (191)

Suit for profits of share of intestate's property —A suit by an heir of an intestate to recover the share of profits accruing after the death of the intestate from another heir who was in possession of the property falls under this Article and not under Article 109 because the occupation of a co heir cannot be said to be wrongful. Article 123 cannot apply as the claim is not as regards the corpus of the estate—*Maung Po v Maung Shwe* 1 Rang 405 A I R 1921 Rang 155

Suit to enforce an award —A suit by the plaintiff to recover money awarded to him against the defendant by an award is not a suit for money governed by the three year's rule but is a suit to enforce an award governed by Article 120 as there is no other Article specially providing for the case—*Riyamal v Maruti* 45 Bom 379 (335) 22 Bom L R 1377 59 Ind Cas 755 *Natalal v Chh* 1st 1 49 Bom 623 A I R 195 Bom 519 see also *Kuldip v Mahant* 34 All 43

Customary dues —A suit to recover *mercis* or customary dues payable by the defendants for the benefit of a *chattram* on account of lands held by them is governed by this Article and not by Art 110 because the dues are not rent claimed by the plaintiff as landlord but as due to the *chattram* by custom—*Venkataragava v District Board* 16 Mad 305 (307)

A suit by a landlord to recover from his tenant *hag-i-chaharum* (i.e. one-fourth of the purchase money due to the proprietor of a *mohalla* on the sale of a house situated in it) on the ground of local custom is governed by this Article—*Kuratha v Ganesh* 2 All 358 *Sham v Bahadur* 18 All 430. Article 62 does not apply moreover it is not a suit to enforce any charge on the property therefore Art 13 also does not apply—*Ibid*

A suit to recover a sum of money on account of marriage dues due to the plaintiff by custom as an emolument of a hereditary office held by him in a temple, is not one for the possession of an interest in immov-

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a suit, after the passing of the C P Code of 1908 to recover the purchase money. And that the right of the purchaser to maintain the present suit must be determined with reference to the Code of 1882 when the sale took place and was confirmed and that right was not extinguished by the promulgation of the Code of 1908. The suit was therefore governed by Article 120 of the Limitation Act of 1877—*Ibid*

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A suit to recover a sum of money on account of marriage dues, due to the plaintiff by custom as an emolument of a hereditary office held by him in a temple, is not one for the possession of an interest in immovable

property. Consequently Article 144 cannot apply the suit is governed by this Article—*Rathna v Tiruvankata* 22 Mad 351 (353)

Right to establish a market —A suit against a Municipal Committee for a declaration of the plaintiffs right to establish a market on their own land and for a perpetual injunction restraining the Collector as the President of the Municipal Committee from interfering with their so doing falls under the Article and must be brought within 6 years from the date on which the Municipality refused permission—*Biraj Mohun v Collector* 4 All 102 (at p 106) affirmed on appeal 4 All 339 (F B)

Suit for share of profits in a ferry —A suit by some of the co sharers of a ferry against the other co sharers for recovery of their share of the profits of the ferry is governed by this Article and not by Art 36 or 115 Article 36 cannot apply because it is not the plaintiffs case that the defendants dispossessed them or committed any tort Article 115 cannot apply because there is no proof of any express or implied contract on the part of the defendants to pay to the plaintiffs their share —*Kishun Dayal v Kishen Deo* 1 P L J 69 (70)

Damages for use and occupation —Some of the joint tenants of certain lands took the use and occupation of part of the joint lands to the exclusion of the other joint tenants who afterwards brought a suit for compensation for such use and occupation It was held that the period of limitation for such a suit was governed by this Article (and not by Article 110 because the suit was not one for rent) and that therefore the plaintiffs were entitled to recover compensation for six years—*Walson v Ramchand* 23 Cal 799 *Madar v Aader Mosdeen* 39 Mad 54 (56)

Suit for possession by non occupancy rayat —A suit by a non occupancy rayat who has been dispossessed from his holding otherwise than by execution of a decree to recover possession of the holding on the basis of title is not a suit under sec 9 of the Specific Relief Act and is not therefore governed by Article 3 but falls under this Article or Art 142—*Tamizuddin v Asirub* 31 Cal 647 (F B)

Suit for arrears of assessment —A suit by inamdar for arrears of assessment against a person who was not let into possession by the plaintiff under any agreement but who held the lands in the village is not a suit for rent under Article 110 (because there is no relationship of landlord and tenant) but is governed by Art 120—*Sadashiv v Ramkrishna* 25 Bom 556 see also *Kasturi v Anantram* 26 Mad 730

Suit by share holder for dividends —A suit by shareholders of a limited company for arrears of dividends is governed by Article 120—*Rama Seshayya v Tripurasundari Cotton Press* 49 Mad 468 (F B) See this case cited in Note 480 under Article 116

Suit by liquidator for calls —A suit by the liquidator of a company after winding up against a shareholder for the amount of calls on the shares taken by him is governed by Art 120 if the suit was brought

by the company itself Art 112 would have applied—*Parrell S & W Co v Manely* 10 Bom 483

Suit by liquidator against Directors —A suit by the official liquidator under sec 235 of the Indian Companies Act (1913) calling upon the directors and the auditor to make good a large sum of money of the company which they have allowed to be mis spent is governed by this Article and not by Article 36 115 or 116—*In re Union Bank* 47 All 699 23 A L J 473 A I R 1925 All 510

Suit for mesne profits —A suit for recovery of profit of immoveable property received by the defendant during the period he was in possession of the property by virtue of a decree of Court (which was afterwards set aside) is governed by this Article and not by Art 109 because the receipt of profits during that period under a decree which was valid at the time cannot be said to be 'wrongful within the meaning of Art 109 The cause of action arises when the decree by virtue of which the defendant obtained possession is set aside—*Holloway v Ghuneshwar* 3 C L J 182

Suit against Muhammadan widow by other heirs —Where the mortgage debt due to a deceased Muhammadan has been realised by his widow, and the other heirs of the deceased sued to recover the money from her held that this Article applied Art 123 did not apply because the widow was not an executor or administrator representing the estate of the deceased person Article 62 might also apply to the suit—*Umardaraj v Wilyat* 19 All 169 (172 174) But see note 51, under Article 123

Suit by Zemindar for removal of trees planted by trespasser —A suit by the Zemindar for removal of trees planted on the waste land in his Zemindary by a trespasser is governed by this Article not by Art 32 because a mere trespasser is not a person having any right to use property for a specific purpose within the meaning of Art 32—*Musharaf v Isfihar* 10 All 634 (635)

Suit on a pro note —A suit on a pro note payable at any time within six years on demand from the date of its execution was held to be governed by this Article as it is a special form of note not contemplated by Art 73 and time ran from the date of the note—*Sanjivi v Errappa* 6 Mad 290 Mr Rustomji has rightly criticized this ruling on the ground that Article 80 which is the residuary Article in respect of pro note ought to have been applied and not the most residuary Article 120 and that the cause of action arose on the expiry of six years from the date of execution of the pro note the pro note being taken as one payable after six years from its date See Rustomji Limitation 3rd Edn p 353

Suit to recover money drawn out of court by defendant —Where the defendant under colour of a decree since reversed has intercepted the money which the plaintiff has realised by summary process under sec 583 C P C and the latter sues to recover by way of restitution the money

so intercepted, his suit is governed by this Article—*Narayana v. Narayana*, 13 Mad 437 (442).

Suit for possession of office.—A suit for possession of the office of *Dharmakarta* of a temple based on a right by prescription and not on a hereditary right to it, and for possession of the property attached to it, is governed by this Article and not by Art. 124; Art 144 also does not apply as the right to the land was only secondary and dependant upon the right to the office—*Kidambi Raghavacharia v Tirumalai*, 26 Mad 113 (115)

Suit by contributors to a common fund for distribution.—Plaintiffs, who had contributed to a common fund to be utilized for family requirements, brought a suit in which they claimed that their shares in the said fund should be determined and paid. *Held* that the suit was neither a partnership suit under Article 106 nor a suit based on contract under Article 113 or 115 that the claim was one which must be dealt with on equitable principles apart from any question of partnership or of contract, and that Article 120 applied to the suit, and the cause of action accrued from the date on which the defendants refused to recognize the rights of the plaintiffs—*Commercial Bank v Allavooddeen*, 23 Mad 583 (592)

Suit against person who is not a trustee.—A suit for accounts against an express trustee is governed by section 10, and is never barred. But a suit for accounts against a person who is not such a trustee is governed by Article 120. Thus, the *karta* of a family cannot be said to be a person in whom the property of the family is 'vested' for a specific purpose, he is not therefore a trustee, a suit against him for accounts is not governed by section 10 but by this Article—*Biswambhar v Giribala*, 25 C W N 356

Suit under Sec 111A of Bengal Tenancy Act.—Suits which fall within the scope of sec 104 H of the Bengal Tenancy Act are governed by the special rule of limitation provided in that section, but suits which fall outside the scope of sec 104 H, the right to maintain which under certain conditions is expressly saved by the proviso to sec 111A, are governed by this Article. Thus, in a proceeding under Chapter X of the Bengal Tenancy Act, for settlement of rents and preparation of settlement Rent Roll, the plaintiffs claimed that they were occupancy raiyats in respect of the lands described in schedule *cha* of the plaint, but the Revenue Officer held that the plaintiffs were tenure holders and only in respect of schedule *ga* land, and settled the lands deducting 30 per cent for their allowance as such and recorded their subtenants as occupancy raiyats, and wrongly excluded *gha* and *una* schedules altogether from their lands. An appeal to the Divisional Commissioner and then to the Board of Revenues was rejected. Thereupon the plaintiffs instituted the present suit. *Held* that so far as the plaintiff are aggrieved by the rent settled as payable by them as tenure holders in respect of land of schedule *ga* and desire to have the entry corrected, the suit falls within the scope of sec 104 H of the Bengal Tenancy Act and is governed by the special period of limitation prescribed

therein but in respect of the other relief the suit falls within the scope of sec 111A and is one under sec-47 of the Specific Relief Act to which the limitation applicable is that provided by Article 120 of the Limitation Act—*Patani v Secretary of State* 45 Cal 645 (652)

Suit by Muhammadan heir to recover moveable property—A suit by the heir of a deceased Muhammadan to recover moveable property left by the deceased is governed by Art 120 but if the property be immovable the suit will fall under Art 144—*Mariam Beccammal v Meera Sahib* 20 Ind Cas 275 *Ahadessa v Aissa* 34 MaL 511 (513) *Joti Pershad v. Sant Lal* 34 P. R. 1914

A suit by one of several Muhammadan heirs for a share of the intestate's moveable property in the possession of another heir is governed by Art 120 and not by Article 49—*Bashirunnissa v Aldur Rahim* 44 All 244 (246) 20 A. L. J 71 64 Ind Cas 974

Suit by adopted son to recover moveable property—A suit by the adopted son to recover immovable property alienated by the widow before the adoption is governed by Art 144 if this property is moveable, Art 120 applies and limitation runs from the date of adoption—*Venkataratnam v Venkataraniiah* 27 M. L. J 569

Suit for settlement of rent—Where the Revenue Officer directed that the lands in question be recorded as liable to payment of rent and it was then too late for the proprietor to apply under sec 105 of the Bengal Tenancy Act for the settlement of rent a suit instituted in the Civil Court by the proprietor to have fair rent settled in respect of the lands is governed by this Article and time begins to run from the date of the order of the Revenue officer—*Berhamdal v Krishna* 20 Ind Cas 910 (Cal)

Suit to set aside municipal election—A suit by a defeated candidate to set aside the election of members of a Municipal Board is a suit of a civil nature and maintainable in a Civil Court and Art 120 governs the suit—*Raghuandan v Sh o Prashad* 35 AlJ 308

Suit by one co-owner against another for recovery of income—A suit by one co-owner of a jaghir to recover his share of the net income from another co-owner who was appointed by the Government as the manager of the jaghir is really a suit for accounts governed by Art 120 and not one under Art 62 because the suit is not for a definite sum of money received by the defendant for the plaintiff—*Subba Row v Rama Row*, 40 Mad 291 (293) See this case cited in Note 70 under Article 62

Suit to set aside order of Government—In 1903 the Government officials marked off the lands in suit and issued to the plaintiff a rough patta showing the lands to which Government admitted his right to obtain a grant subject to the usual conditions. The plaintiff preferred objection to the exclusion from the rough patta of the lands in suit. His objections were rejected in 1905. In 1913 the plaintiffs brought a suit to set aside the order of dismissal of objection and for a declaration of his right. Held that

so intercepted, his suit is governed by this Article—*Narayana v Narayana*, 13 Mad 437 (442)

Suit for possession of office —A suit for possession of the office of *Dharmakarta* of a temple based on a right by prescription and not on a hereditary right to it and for possession of the property attached to it, is governed by this Article and not by Art 124 Art 144 also does not apply as the right to the land was only secondary and dependant upon the right to the office—*Kidambi Raghavacharia v Tirumalai*, 26 Mad 113 (115)

Suit by contributors to a common fund for distribution —Plaintiffs who had contributed to a common fund to be utilized for family requirements, brought a suit in which they claimed that their shares in the said fund should be determined and paid Held that the suit was neither a partnership suit under Article 106 nor a suit based on contract under Article 113 or 115 that the claim was one which must be dealt with on equitable principles apart from any question of partnership or of contract, and that Article 120 applied to the suit, and the cause of action accrued from the date on which the defendants refused to recognize the rights of the plaintiffs —*Commercial Bank v Allavooddeen*, 23 Mad 583 (592)

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Article 120 governed the suit which was therefore barred—*Ambu Nair v Secretary of State* 47 Mad 572 (P C) 80 Ind Cas 835 A I R 1924 P C 150 29 C W N 365

509 When the right to sue accrues—*Trespass*—In a suit for declaration that the defendants are not entitled to open a door in their wall and to commit trespass upon the platform of the plaintiffs well it was held that each act of trespass constituted a fresh cause of action and the suit brought more than nine years after the defendants opened the door was not barred—*Sheo Prasad v Mangar* 12 A L J 1150

Entry in Revenue Records—Plaintiffs having purchased certain lands in 1867 brought a suit in 1890 to obtain a declaration of their right to have the lands registered in their name in the Revenue records. It was held that the right to be placed on the register is a right which does not give rise to a cause of action until it is asserted or denied and a suit for a declaratory decree in respect of it must be brought within six years from the time when the right was disputed. In the present case the right had not been asserted or denied until the present suit was filed and the defendant did so in his written statement the suit was therefore not barred—*Bhishaji v Pandu* 19 Bom 43 (45)

The mere entry of the defendant's name in the village papers would not of itself give the plaintiff a cause of action if such entry was made without the knowledge of the plaintiff. The plaintiff's right to sue would accrue when he became for the first time aware of the fact that the name of the defendant was entered in the revenue papers—*Gopal Das v Shri Thakur Ganga* 23 A L J 231 A I R 19 2 All 115 63 Ind Cas 148

The mere entry of the defendant's name as owner of a property in the revenue papers does not give rise to a cause of action for the plaintiff in respect of a declaration of his title to the property and time does not begin to run against the plaintiff till an actual claim is made by the defendant on the strength of the entry in the papers—*Dina v Rama* 23 C L J 561 or till the defendant attempts to dispossess the plaintiff—*Suraj Kumar v Umed Ali* 25 C W N 1022 Thus where the defendant's name was entered in the Revenue papers in 1899 in respect of property to which the plaintiff was entitled and on the strength of that entry the defendant instituted a suit in 1903 for profits of the share in respect of which he got his name entered it was held that the plaintiff got a fresh cause of action in 1903 for a declaratory suit—*Shinner v Shankar* 31 All 10 (Note). In 1875 the owners of certain Zemindary property sold their interest in it with the exception of 26 bighas. In 1888 the vendors were recorded as exproprietary tenants of all the lands including the 26 bighas. In 1903 the vendors applied to have the village papers corrected and to get themselves recorded as proprietors of the 26 bighas but their application was refused in 1904 and they were told to go to the Civil Court. In 1910 the purchasers applied to

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The mere entry of the defendant's name as owner of a property in the revenue papers does not give rise to a cause of action for the plaintiff in respect of a declaration of his title to the property, and time does not begin to run against the plaintiff till an actual claim is made by the defendant on the strength of the entry in the papers—*Dina v Rama* 23 C L J 561, or till the defendant attempts to dispossess the plaintiff—*Suroj Kumar v Umed Ali* 25 C W N 1022. Thus where the defendant's name was entered in the Revenue papers in 1899 in respect of property to which the plaintiff was entitled, and on the strength of that entry the defendant instituted a suit in 1903 for profits of the share in respect of which he got his name entered, it was held that the plaintiff got a fresh cause of action in 1903 for a declaratory suit—*Skinner v Shankar*, 31 All 10 (Note). In 1875 the owners of certain Zemindary property sold their interest in it with the exception of 26 bighas. In 1883, the vendors were recorded as exproprietary tenants of all the lands including the 26 bighas. In 1903 the vendors applied to have the village papers corrected and to get themselves recorded as proprietors of the 26 bighas, but their application was refused in 1904 and they were told to go to the Civil Court. In 1910 the purchasers applied to

have the rent assessed on the 26 bighas and obtained an order in their favour. The vendors thereupon brought the present suit in 1912 for a declaration that they were the proprietors. *Held* that the suit was not barred as the cause of action arose in 1910 and not in 1904. Notwithstanding the order of 1904 the plaintiffs remained in possession of the land without liability to pay rent therefor. It was not until rent was assessed in the proceedings of 1910 that they became liable to pay rent. The order of 1910 gave the plaintiffs an entirely fresh cause of action—*Allah Jula v Umrao Husan* 36 All 492 (495). So also where the plaintiffs had all along been in possession of the land in suit but in 1901 the settlement authorities had made an entry which showed that they were entitled to a smaller area they objected to the entry but their objection was rejected. They however remained in undisturbed possession of all the land to which they were entitled. In 1909 the Collector ordered that the entry should be corrected but the Commissioner set aside his order and the plaintiffs then brought a suit for declaration in 1910. *Held* that the suit was within time in as much as the Commissioner's order of 1909 gave the plaintiffs a fresh cause of action as it was a fresh attack upon their title whether the proceedings of 1901 gave them a cause of action or not—*Sheopher v Deonarash* 10 A. L. J. 413 17 Ind. Cas. 675 (followed in 35 All 492). The Revenue authorities had entered the name of the defendants as owners and the names of the plaintiffs as in possession. As the plaintiffs were not disturbed in their possession they did not then bring any suit for correction of the revenue records. Subsequently the defendants applied for partition and the Revenue authorities allowed partition directing the plaintiffs to bring a regular suit. The plaintiffs thereupon sued for a declaration of their title. *Held* that it was not obligatory on the plaintiffs to bring a suit after the first revenue proceedings in as much as they were not disturbed in their possession and that the plaintiffs had a fresh cause of action from the date of the order of the Revenue officer in the partition proceedings and could bring the suit within six years from that date—*Hakim Singh v Maryaman* 140 P. R. 1907. The defendant's name was recorded as proprietress some 30 years before suit and the entry was continued at the revision of the settlement afterwards she left the village and received no share of the profits and within six years before suit she transferred a portion of the property. Thereupon the plaintiffs instituted the present suit for a declaration of their title. *Held* that the fact that the plaintiffs did not think it worth while to bring a suit 30 years before when the defendant's name was recorded did not bar the present suit for a fresh cause of action arose when the defendant transferred the property—*Rahmatulla v Shamsuddin* 11 A. L. J. 877. The plaintiffs sued for a declaration of their proprietary rights in certain land alleging that the land in dispute was in their possession that the revenue authorities wrongly included it in the estate of the defendants neither the plaintiffs nor the defendants being a party to the action of the

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The mere entry of the defendant's name in the village papers would not of itself give the plaintiff a cause of action if such entry was made without the knowledge of the plaintiff. The plaintiff's right to sue would accrue when he became for the first time aware of the fact that the name of the defendant was entered in the revenue papers—*Gopal Das v Shri Thakur Gangi* 23 A L J 231 A I R 1924 All 115 65 Ind Cas 143

The mere entry of the defendant's name as owner of a property in the revenue papers does not give rise to a cause of action for the plaintiff in respect of a declaration of his title to the property and time does not begin to run against the plaintiff till an actual claim is made by the defendant on the strength of the entry in the papers—*Dina v Rama* 23 C L J 561 or till the defendant attempts to dispossess the plaintiff—*Suraj Kumar v Umed Ali* 25 C W N 1022. Thus where the defendant's name was entered in the Revenue papers in 1899 in respect of property to which the plaintiff was entitled and on the strength of that entry the defendant instituted a suit in 1903 for profits of the share in respect of which he got his name entered it was held that the plaintiff got a fresh cause of action in 1903 for a declaratory suit—*Shanner v Shankar* 31 All 10 (Note). In 1875 the owners of certain Zemindary property sold their interest in it with the exception of 26 bighas. In 1883 the vendors were recorded as exproprietary tenants of all the lands including the 26 bighas. In 1903 the vendors applied to have the village papers corrected and to get themselves recorded as proprietors of the 26 bighas but their application was refused in 1904 and they were told to go to the Civil Court. In 1910 the purchasers applied to

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Revenue authorities and that the defendants on the strength of the said entry endeavoured to oust the plaintiffs from the land. Held that the cause of action of the plaintiff did not accrue on the date of the entry in the settlement Records but from the date when the defendants attempted to oust the plaintiff—*Natha Singh v Sadiq Ali* 20 P R 1900. A certain plot of land was recorded as the separate property of the defendants in the settlement records of 1887. In 1914 the defendants made an application for partition claiming the plot as their separate property. In a suit brought by the plaintiffs in 1915 for a declaration that they were joint owners of the land with the defendants it was held that although a cause of action might have arisen by reason of the settlement entry in 1887 still a fresh cause of action arose in 1914 when the plaintiffs found themselves in danger of being actually deprived of their joint ownership. The suit was therefore not barred—*Ka's Prasad v Harbans* 41 All 579 (512). A was the sole owner of a land but his brother in law B had the lands recorded in the Record of Rights as being held in joint tenancy by A and B. A took no steps to have the entry corrected and B made no attempt to draw material benefit from the land. Afterwards B instituted a suit in the Small Cause Court claiming to participate in the profits of the land. A suit by A for a declaration that he was the sole owner of the land brought within six years from the receipt of the summons of the Small Cause Court was in time because the plaintiff's cause of action arose not from the publication of the Record of Rights but from the date of institution of the Small Cause Court suit which gave a serious challenge to his right—*Moulvi Alaiddin v Bibi Saibunissa* P J 1 217. Where there is a definite challenge to the plaintiff's rights by an entry made in the Record of Rights and where the fact is patent that the plaintiff must have been aware of that challenge to his rights the suit if brought upon that challenge must be brought in accordance with the six years' rule of limitation but if the plaintiff continues in possession in spite of the entry he is not required to institute any suit for declaration upon that challenge but may institute a suit at any time within six years of any new challenge which has the effect of prejudicing his rights—*Ramji v Lala Sadhu saran* 2 P L J 493 (495).

In the following cases it has been held that time runs from the date of entry in the revenue records. Thus where the plaintiffs sued on the allegation that they were in possession as proprietors of certain lands erroneously recorded in the settlement as the property of the defendants and prayed that the record may be amended and their own names recorded held that the period of limitation was to be reckoned from the date of the entry (or from the date when the record of rights was sanctioned)—*Fazlud v Mehndi* 79 P R 1879. Where the settlement officer had expunged the name of the plaintiffs from the Revenue papers and had wrongfully caused the name of the defendant to be entered, but the plaintiffs had all along remained in

possession, notwithstanding the settlement record and then sued for a declaratory decree *held* that the period of limitation ran from the date of the entry in the revenue papers it was further held that the wrong entry in the village papers was a wrong committed once for all and not a continuing wrong within the meaning of sec 23—*Legge v Ram Baran* 20 All 35 (37) F B (It should be noted that in these cases there was no fresh invasion of the plaintiff's rights by the defendant and consequently time ran from the date of entry in the records and there was no fresh cause of

1. 1901 The plaintiff's father had applied in 1903 for entry of his name in the Revenue register as the owner of certain land but the Revenue authorities refused to do so. In 1917 the plaintiff again applied to have the land entered in his name but on the objection of the defendants the Revenue authorities refused to change the registry. He then brought a suit for a declaration that he was the owner of the land. *Held* that the suit was barred by the Limitation Act of 1908 and the plaintiff did not acquire a fresh cause of action when the defendants had attempted to disturb the plaintiff's possession of the property in derogation of the plaintiff's title. *See* *Legge v Ram Baran* 20 All 35 (37) F B.

2. *See* *Legge v Ram Baran* 20 All 35 (37) F B. A fresh cause of action arises when the Revenue authorities refuse to correct the error in the Revenue papers. *See* *Legge v Ram Baran* 20 All 35 (37) F B. The Revenue Court refused to grant a declaration that the plaintiff was the owner of the land. *See* *Legge v Ram Baran* 20 All 35 (37) F B.

3. *See* *Legge v Ram Baran* 20 All 35 (37) F B. The Revenue Court refused to grant a declaration that the plaintiff was the owner of the land. *See* *Legge v Ram Baran* 20 All 35 (37) F B.

Revenue authorities and that the defendants on the strength of the said entry endeavoured to oust the plaintiffs from the land. *Held* that the cause of action of the plaintiff did not accrue on the date of the entry in the settlement Records but from the date when the defendants attempted to oust the plaintiff—*Natha Singh v Sadiq Ali* 20 P R 1900 A certain plot of land was recorded as the separate property of the defendants in the settlement records of 1887. In 1914 the defendants made an application for partition claiming the plot as their separate property. In a suit brought by the plaintiffs in 1915 for a declaration that they were joint owners of the land with the defendants it was held that although a cause of action might have arisen by reason of the settlement entry in 1887 still a fresh cause of action arose in 1914 when the plaintiffs found themselves in danger of being actually deprived of their joint ownership. The suit was therefore not barred—*Kali Prasad v Harbans* 41 All 579 (512) A was the sole owner of a land but his brother in law B had the lands recorded in the Record of Rights as being held in joint tenancy by A and B. A took no steps to have the entry corrected and B made no attempt to draw material benefit from the land. Afterwards B instituted a suit in the Small Cause Court claiming to participate in the profits of the land. A suit by A for a declaration that he was the sole owner of the land brought within six years from the receipt of the summons of the Small Cause Court was in time because the plaintiff's cause of action arose not from the publication of the Record of Rights but from the date of institution of the Small Cause Court suit which gave a serious challenge to his right—*Moulvi Alaeddin v Bib Saibunissa* P I J 557 Where there is a definite challenge to the plaintiff's rights, by an entry made in the Record of Rights and where the fact is patent that the plaintiff must have been aware of that challenge to his rights the suit if brought upon that challenge must be brought in accordance with the six years' rule of limitation but if the plaintiff continues in possession in spite of the entry he is not required to institute any suit for declaration upon that challenge but may institute a suit at any time within six years of any new challenge which has the effect of prejudicing his rights—*Ramji v Lala Sadhusaran* 7 P L J 493 (495)

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possession, notwithstanding the settlement record, and then sued for a declaratory decree *held* that the period of limitation ran from the date of the entry in the revenue papers it was further held that the wrong entry in the village papers was a wrong committed once for all and not a continuing wrong within the meaning of sec 23—*Lagge v Ram Baran*, 20 All 35 (37) F B (It should be noted that in these cases there was no fresh invasion of the plaintiff's rights by the defendant, and consequently time ran from the date of entry in the records and there was no fresh cause of action) The plaintiff's father had applied in 1903 for entry of his name in the Revenue register as the owner of certain land but the Revenue authorities refused to do so In 1917 the plaintiff again applied to have the land registered in his name, but on the objection of the defendants the Revenue authorities refused to change the registry He then brought a suit for a declaration that he was the owner of the land *Held* that the suit was barred, as the cause of action arose in 1903 and the plaintiff did not acquire a fresh cause of action in 1917 If the defendants had attempted to disturb the plaintiff's possession or claim any right to the property in derogation of the plaintiff's right, such an act would have given a fresh cause of action—*[Perambath Chathu v Neela Kandhan* 42 M L J 457, A I R 1922 Mad 194 Where the defendant's name was entered in the Revenue papers in 1895, and the plaintiff in 1903 applied for correction of those papers when the defendant again asserted his title, and the Revenue Court refused to make the correction, whereupon the plaintiff instituted a suit for declaration of title in 1904 it was held that the plaintiff's cause of action arose in 1895, and no fresh cause of action accrued in 1903, the refusal to correct the entry in 1903 was merely a continuation of the original cause of action—*Akbar v Turabai*, 31 All 9 In a Patna case, where the defendant in 1905 caused the name of the plaintiff to be entered in the Record of Rights as a tenant liable to pay rent to the defendant, and on the strength of that entry he obtained a rent decree against the plaintiff in 1912, and then the plaintiff brought a suit in 1912 for a declaration that he was a *lakheraj* tenant of the land and not liable to pay rent to the defendant, it was held that the suit was substantially a suit under sec 111A of the Bengal Tenancy Act for getting a declaratory relief in respect of Record of Rights although the plaint made no mention of the Record of Rights, and therefore the cause of action for the plaintiff's suit accrued on the date of the publication of the Record of Rights in 1905 and not from the date of the rent decree of 1912—*Sh-ikh Amiruddin v Shesh Saldur*, 1 P L J 73 (76)

Declaration that property not liable to sale—A mortgaged a property to B C brought a suit to recover possession of the property and obtained a decree B then brought a suit on the mortgage obtained a decree and applied for sale of the property. C claimed the property and brought this suit for a declaration that the property was not liable to sale in execution of B's decree It was held that the fact of the mortgage did not

affect the plaintiff's right so long as no effort was made to sell the property in enforcement of the mortgage and that the cause of action arose when the defendant attempted to sell the property—*Imambandi v Puran* 17 A L J 973

Other cases—On the 20th January 1909 a house situate within the ambit of the Zemindari appertaining to an endowment was sold and the sale-deed was presented for registration on the same day. The registration however was completed on 29th January 1909 as provided for in sec 61 (2) of the Registration Act. Thereupon the plaintiffs representing the Zemindar instituted a suit for *zari* & *chaharam* on 28th January 1915. It was held that the suit was barred by limitation the right to sue having accrued to the plaintiffs from the date of the sale and not from the date of the completion of the registration—*Bindhesri v Somnath* 14 A L J 38.

In a suit against an administrator on an administration surety bond the cause of action arises on failure by the administrator to comply with any of the conditions of the bond or on the administrator putting it out of his power to comply with them. The fact that no action is taken on the breach of one or more of the various conditions of the bond would not bar a suit on a subsequent breach—*Kopu v Ma Thein* 12 Bur L T 225 56 Ind Cas 968. But in *Ramanathan v Rangammal* 17 M L T 61 *Ahmed v Fatima* 8 Bur L T 59 and *Maung San v Maung Kyau* 1 Rang 463 the suit was held to be governed by Art 68.

In a suit by a zamindar for a declaration that the mineral rights in certain lands are reserved to himself and have not been granted to the tenant (defendant) a fresh cause of action arises whenever any particular portion of minerals is removed by the defendant—*Humar Pramath Nath v A J Meek* 5 P L J 273 (285).

Although the attachment of a person's land as if it belonged to another gives the owner a cause of action for bringing a suit to set aside the attachment yet he is not bound to do so, and he can after the execution sale bring a suit for a declaration of the invalidity of the sale because the execution sale affects the title of the owner to the property in a different and greater degree than that in which an attachment affects him and the sale gives him a fresh cause of action—*Anantharamu v Narayanaramu* 36 Mad 383 (384 385).

In a suit for a declaration that the Zemindar was not entitled to recover more than a stated sum from the plaintiff for quit rent the plaintiff's right to sue accrued on each occasion when the Zemindar collected the excess amount of rent as each illegal exaction is a separate injury giving rise to a fresh cause of action—*Sriman Madhabusi v Gopisetti Narayana saamy* 33 Mad 171 (172).

The defendant who was shown in the revenue records as a *lakshmidhar* entitled to one third share of the produce issued a notice of ejectment in 1912 to the plaintiff who was shown in the revenue records to be the

owner of the lands in suit. The plaintiff brought a suit in the Revenue Court to contest the notice but was defeated. Thereupon proceedings in execution of the notice took place; but the proceedings were purely formal and in fact the plaintiff retained physical possession of the land in suit. In other words so far as the plaintiff was concerned, the ejectment proceedings of 1912 in no way affected his possession. A further notice of ejectment was then issued against him. *Held* that the fresh notice constituted a fresh invasion of his title and that therefore limitation for his suit for declaration of title began to run from the date of the fresh notice—*Bela Singh v Laishmi Das* 6 Lah 132, 26 P L R 326, A I R. 1925 Lah 391, 89 Ind Cas 299.

Where during a partition proceeding in 1895 the defendant denied the plaintiff's title, but both the plaintiff and the defendant remained in joint possession, and the plaintiff's enjoyment was not interfered with, but during fresh partition proceedings in 1914 the defendant again denied the plaintiff's title to a share. *Held* that the fresh invasion of the plaintiff's title gave him a fresh cause of action, and his suit for a declaration of title brought in 1918 was not barred—*Muhammad Hanif v Ratan Chand*, 3 Lah 43 (46).

Suit by remote reversioner —It has been already stated in Note 500 above that a suit by a remote reversioner for a declaration that the alienation made by the widow is not binding on the estate, falls under this Article and not under Article 125. The period of limitation for such a suit is to be counted from the time when "the right to sue accrues" under this Article. The right of suit of the remote reversioner accrues when the nearest reversioner precludes himself or herself from maintaining a declaratory action by omitting to sue within the statutory period, and thus practically concurs in an alleged improper alienation, i. e., it accrues after the lapse of 12 years from the date of alienation—*Abinash v Harinath*, 32 Cal 62 (70). In a Bombay case, a Hindu died leaving his widow and daughter. The widow made an alienation in 1869, but the daughter (who was then the immediate reversioner) did not impeach the alienation and after the death of the daughter in 1879 the plaintiffs, who are her sons, brought a declaratory suit in 1883. It was held that the suit was barred, as the cause of action arose when the property was sold in 1869 during the life time of the plaintiff's mother who was then the nearest presumptive reversioner, and no fresh cause of action accrued to the plaintiffs on their mother's death; it could not have been the intention of the Legislature, in giving a right to sue for a declaration within six years from the accrual of the right to give successive rights to a series of successive reversioners to harass the alienees of an estate with repeated suits in respect of the same alienation—*Chhaganram v Bai Motigari*, 14 Bom 512 (515). But this ruling was given under the Act of 1859 and should not be taken as good law now, because substantial changes have been made in the Acts of 1871, 1877 and 1908. U

Article 120 of the present Limitation Act, the question is not when the cause of action arises but when the plaintiff's right to sue accrues.

The Allahabad High Court is of opinion (virtually dissenting from the above Calcutta ruling) that the failure on the part of the nearest reversioners to bring a suit for a declaration under Art. 125 within 12 years of the date of alienation does not create any cause of action for the next reversioners to bring a suit within a further period of six years under Article 120. A remoter reversioner is not entitled to sit still and wait for limitation to run out against every reversioner nearer in degree than himself. An improper alienation by a Hindu widow is a wrong to the entire body of reversioners, and it affords an immediate cause of action to all of them. In other words, the starting point of limitation for a suit by a remote reversioner is the date of alienation and the suit is governed by Article 120—*Kunwar Bahadur v Bindrabai*, 37 All 195 (202), *Anand v Ram Sahai*, 27 O. C. 173 A. I. R. 1924 Oudh 381. The same view has also been expressed in *Chiruvolu v Chiruvolu*, 29 Mad 390 (411), and *Narayana v Rama*, 38 Mad 396 (401).

If the nearest reversioner is found to have colluded with the widow in the matter of alienation, the remote reversioner is entitled to bring a suit for declaration and the cause of action arises as soon as the fact of collusion becomes known to him—*Kunwar v Bindrabai*, 37 All 195 (200).

Suit by reversioner born after alienation—An entirely different case arises when the suit is brought by a remote reversioner who is born after the date of alienation. It is a well known principle of law that one reversioner does not derive his title through another, (even though that other happens to be his father), but all of them claim from the last full owner. Consequently the right of a remote reversioner to sue is not derived from the right of the nearer one. If therefore the right of the nearest reversioner for the time being to contest an alienation by the widow is allowed to become barred by limitation as against him, this will not bar the similar rights of the subsequent reversioner who was born after the date of alienation. The subsequent reversioner's right to sue accrues only on his birth, and if he brings the suit while he is still a minor, or within three years after attaining majority, it is not barred, although more than twelve years have elapsed after the date of alienation—*Bhagwanta v Sukhi*, 22 All 33, 47 (F. B.), *Abinash v Harinath*, 32 Cal 62 (71). This was also the view of the Madras High Court in *Gobinda v. Thayammal*, 28 Mad 57 (60) and *Narayana Aiyar v Rama Aiyar*, 38 Mad 396 (400, 405). But these cases have been overruled by the Privy Council case of *Varamma v Gopala Dasaya* 41 Mad. 659 (F. B.). In this case it has been laid down that the cause of action for a suit for a declaration that an alienation by a widow is not binding on the estate, arises on the date of alienation jointly and simultaneously for the entire body of reversioners. If, therefore, the alienation is not impeached by a declaratory suit within 12 years under Article 125 by the nearest

reversioner, a remote reversioner born after the lapse of 12 years from the date of the alienation will be debarred from bringing a suit for declaration. The correctness of this ruling has been doubted in *Das Ram v. Tirthanath*, 51 Cal. 101, at p 108, but it has been followed by the Lahore High Court in *Chiragh Din v Abdulla*, 6 Lah 405 90 Ind Cas 1022

The property of a Hindu female who was the daughter of the last male holder, and who was entitled to a limited estate, was during her minority sold by her guardian in 1891. The plaintiff (the last male holders' daughter's son) who is her reversioner, and who was not born at the date of the alienation, brought a suit in 1916 for a declaration that the sale was ineffective as against him. *Held* that the suit was governed by this Article and not by Article 125 as the alienation was not made by the female herself but by her guardian, and that the right of action accrued to the plaintiff when he was born (in 1896), and the suit was in time as it was brought within three years of his attaining majority (secs 6, 8)—*Das Ram v Tirthanath*, 51 Cal 101 (108), 81 Ind Cas 522, A I R. 1924 Cal 481

PART VIII—*Twelve years.*

<p>121.—To avoid incumbrances or undertenures in an entire estate sold for arrears of Government revenue, or in a patni taluk or other saleable tenure sold for arrears of rent</p>	<p>Twelve years</p>	<p>When the sale becomes final and conclusive</p>
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510 Scope.—This Article applies not only to a suit brought by the auction purchaser at a revenue sale, but also to a suit brought by a transferee from such auction purchaser who is entitled to the same rights as his assignor—*Koylash v Jubra Ali* 22 W R 29, *Wahid Ali v Raht Ali*, 12 C W N 1029 see also *Sasi Bhushan v Kramtulla* 10 C W N 148, *Narayan v Kasiswar*, 1 C L J 379

511. Incumbrance.—It has been held in a large number of cases that adverse possession is an incumbrance within the meaning of this Article or within the meaning of the Patni Taluk Regulation (VIII of 1819) or of Bengal Revenue Sale Act (XI of 1859)—*Nuffar Chandra v Rajendra* 25 Cal 167 (171) *Karmi Khan v Brojo Nath*, 22 Cal 244 (251), or under the Assam Land and Revenue Regulation—*Prasanna v Jnanendra* 43 Cal 779 (782) But it should be noted that where the estate is sold subject to incumbrances, the adverse possession of the defendant for the statutory period before the date of sale is not an incumbrance and a suit to recover possession is not a suit to avoid an incumbrance within the meaning of this Article, and is barred even though brought within 12 years from the date of sale This view is deducible from *Kumar Kalanand v Syed Sarafat*, 12 C W N 528, and *Ramuddin v Nalini Kanta* 13 C W. N 407.

Thus, where the estate is sold (for arrears of revenue) subject to incumbrances and it appears that the adverse possession of the defendant had commenced before the estate was sold for arrears of revenue, (i.e., if the defendant had been holding adversely to the old proprietors) and the adverse possession was sufficiently long i.e., for more than twelve years before the institution of the suit to avoid the incumbrance, the suit would be barred by limitation even though brought within 12 years from the date of the revenue sale Such a suit is not governed by Article 121 but by Article 144—*Harmi Khan v Brojonath*, 22 Cal 244 (251)

Where the plaintiff purchased the estate with right to avoid incumbrances but it was found that the adverse possession of the defendants and their predecessors commenced even *before the creation of the pawns* such adverse possession was not an incumbrance which the plaintiff was entitled to avoid within the meaning of this Article and therefore this Article did not apply to a suit to recover possession from the defendants (The suit fell under Article 144 and was consequently barred)—*Kalskanand v Bipradas* 19 C W N 18 16 Ind Cas 436 The reason is that an incumbrance in order to be so must be one which accrued upon the tenure by the act or inaction of the defaulting patnadar himself and therefore an adverse possession in order to be an incumbrance must be a possession which has commenced *after* the creation of the *pawns* tenure—*Ibid* Therefore where the defendants had been holding adversely for a period greatly exceeding 12 years and the evidence did not establish whether the defendants had commenced *so* to hold after the creation of the *pawns* the plaintiff's suit would fail because in order to bring the case under this Article the onus would be upon the plaintiff to show that the adverse possession of the defendants commenced after the *pawns* was created—*Bipradas v Hamini Kumar* 19 Cal 27 34 (P C)

If the land is sold with *power to avoid incumbrances* then a suit to recover possession of land from the adverse possessor is a suit to avoid incumbrances within the meaning of this Article and the period of limitation runs from the date when the sale becomes final and not from the time when the adverse possession commenced Even if it is regarded as a suit under Article 144 still the period of limitation would run when the sale becomes final the possession of the defendant being regarded as becoming adverse to the plaintiff only from the date of the auction purchase—*Nuffar Chandra v Rajendra* 25 Cal 167 (171) *Prosanna v Jnanendra* 43 Cal 779 (782)

The period of limitation runs when the sale becomes final and not from the date when possession was formally given to the purchaser at the sale—*Prosanna v Jnanendra* 43 Cal 779 (782)

A person who had been in possession of a portion of a revenue paying estate adversely to the owner for more than 12 years before the estate was sold for arrears of revenue under the Assam Land Revenue Regulation 1886 would be considered as a joint proprietor liable to pay the revenue under sec 63 of that Regulation and therefore a defaulter within the meaning of sec 67 he held no incumbrance which the auction purchaser was called upon to annul by a suit within the period prescribed by this Article Being a defaulter his interest was sold away by the revenue sale and the suit brought by the purchaser to recover possession of his share would be a suit for possession under Art 142—*Mahim Chandra v Piyari* 44 Cal 412 (423 424)

If the *patni* came to an end not by reason of *sale* for arrears of

but by voluntary *relinquishment* by the patndar in favour of the Zamindar, a suit by the latter to recover possession of the land from the persons who had taken possession of it adversely to the patndar was governed by Art 144 and not by this Article, and time ran from the date when the defendants took possession and not from the date of relinquishment—*Gobinda v Surja Kanta*, 26 Cal 460 (463)

512. Under-tenure —This Article refers to under tenures which are not avoided *per se* by the sale but which are voidable at the option of the purchaser, such as a *durpalm* tenure which is voidable on the sale of a patni tenure On a sale of a tenure for arrears of rent under Act VIII of 1869 or Reg. VIII of 1819 the under-tenures are not avoided *ipso facto*, but are voidable at the option of the purchaser, consequently this Article applies to a suit brought by the purchaser for that purpose—*Titu v Mohesh Chandra*, 9 Cal 683, 687 (F B) (overruling *Unnoda v Mothooranath*, 4 Cal 860)

122.—Upon a judgment	Twelve	The date of the judg-
obtained in British	years	ment or recogni-
India, or a recogni-		sance
sance.		

513. This Article does not enable suits to be brought upon all judgments obtained in British India, but only provides a period of limitation for suits upon such judgments as can be sued upon—*Jivi v Ranji*, 3 Bom 207 (209) Thus, no suit can be brought upon a decree, the execution of which is barred by limitation—*Fakirapa v Pandurangapa*, 6 Bom 7 (9); *Dhanraj v Lakhraji*, 38 All 509 (516) An action is allowed to be maintained on a judgment only where the judgment cannot be enforced in any other way—*Kalscharan v Sukhoda*, 20 C W N. 58, 30 Ind Cas 824

An order of the High Court in its insolvency jurisdiction is a judgment of the High Court, and a suit based upon such order is maintainable. Such a suit is governed by this Article—*Annoda v. Nobo*, 33 Cal. 560 (564).

Where the plaintiffs obtained a decree against the defendant's father, and after his death the execution of that decree was refused as against the family property in the possession of the defendants, and thereupon the plaintiffs brought the present suit against the defendants to enforce the father's decree debt against the sons, *held* that the suit was not governed by Article 122, because the sons not being parties to the judgment obtained against their father, it was not binding upon them and they could not therefore be sued upon a judgment obtained against the father. It is a suit brought to enforce against the sons their pious obligation to discharge their father's debt, and falls under the residuary Article 120—*Periasami v. Satharāma*, 27 Mad 243, 249 (F. B) In another Madras case, under similar facts, it was held that the suit against the son was not a suit upon

a judgment, because under the Civil Procedure Code no second suit would lie upon a previous judgment the remedy provided being its execution in the manner provided in the Code—*Ramaya v Venkatarathnam*, 17 Mad, 122 (129)

The Calcutta High Court holds that a suit may be instituted in the High Court on a decree of the High Court itself—*Attarmony v Hurry Doss*, 7 Cal 74 (75) But the Bombay High Court dissents from this view in *Merwanji v Asfabad* 8 Bom 1 (at p 13)

According to the Calcutta High Court an action does not lie in that Court upon a judgment of the Calcutta Court of Small Causes—*Moonshe Golam v Curreem Bux* 5 Cal 294 But the Bombay High Court holds that such suit is maintainable if there is not sufficient moveable property of the defendant within the jurisdiction of the Small Cause Court, and there is sufficient immoveable property within the jurisdiction of the High Court—*Gakirappa v Pandurangappa*, 6 Bom 7 (10)

Where a suit on a judgment is barred that judgment cannot be made the basis of a suit for the administration of the estate of the judgment-debtor Thus an application was made to the High Court for an order absolute for sale of the mortgaged property in execution of a mortgage-decree transferred to it for execution by a mofussil Court, and the application was refused on the ground that the mortgaged properties were outside the jurisdiction of the High Court, a suit was then brought by the decree holder for the administration of the estate of the mortgagor (who had died already) and for sale of the mortgaged properties, more than twelve years after either the date of the original debt or the date of the mortgage-decree Held that the suit was barred by limitation—*Jogemaya v Thachomant* 24 Cal 473 (488)

123—For a legacy or for a share of a residue bequeathed by a testator, or for a distributive share of the property of an intestate	Twelve years	When the legacy or share becomes payable or deliverable
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514 Whether defendant must lawfully represent the estate—In earlier cases it was held that this Article applied only to cases in which the property was sought to be recovered as such from a person who lawfully represented the estate and whose legal duty it was to distribute the estate, as for instance, an executor—*Issur Chandra v Juggut Chunder*, 9 Cal 79; *Azizul Huq v Maryam*, 17 O C 157, *Khadirsha v Ayissa*, 34 Mad 511 (512) Therefore where a Mahomedan died intestate, the estate vested in the heirs and no one was bound by law to distribute the property, a suit by one of the heirs against the others to recover possession of his

was governed by Art. 144, if the property was immoveable, and by Art 120, if the property was moveable. Article 123 did not apply to the case—*Khadirsha v Ajissa*, 34 Mad 511 (513), *Zainab v Ghulam Rasul*, 4 Lah 102 (404) *Azizul v Maryam*, 17 O C 157. So also, where the amount of a mortgage-debt due to a deceased Mahomedan was realised by the widow, and the other heirs brought a suit to recover the money from her, held that the suit fell under Article 120 and not under this Article, because the widow was not an executor or administrator representing the estate of the deceased and was not bound to distribute the shares of the plaintiffs—*Umardaraj v Wilayat* 19 All 169 (172). An executor *de son tort*, though he can be treated as incurring the liability of an executor for certain purposes yet cannot be taken to represent the estate of the deceased. A suit to recover certain moveable properties of the deceased from such person did not fall under this Article but under Article 120—*Sithamma v Narayana* 12 Mad 487 (488). A person who obtained a succession certificate was not a person who either as executor or administrator represented the estate of the deceased and he was not under any obligation to distribute the shares in the property of the deceased among those entitled to them. Article 123 did not apply to a suit brought against him by the other heirs of the deceased for the recovery of money collected by him—*Ahidannessa v Isuf Ali Khan*, 50 Cal 610 (614).

But the current of recent decisions is to the contrary. Thus in a recent Madras case, it has been held that this Article applies to a suit against any person who is in possession of the estate and bound to pay the legacies and is not confined to a suit against the executors or administrators only. "The wording of Article 123 is general, it refers to a suit for a legacy or for share of residue bequeathed by a testator, and if the legatee has a cause of action against the person in possession of the assets of the testator, I do not see why there should be a further qualification that the person in possession of the assets should be an executor or administrator. I think it will be reading into the Article words which are not there, namely that the suit should be for a legacy or share of a residue against an executor or administrator." Article 123 applies to a suit for a legacy against any person rightly or wrongly in possession of the estate under such circumstances that he is bound to deal with it as the estate of the deceased. Therefore a suit to recover legacy against an executor *de son tort* falls under this Article—*Sri Raja Parthasarathy v Sri Raja Venkatadri*, 46 Mad 190 43 M L J 486, A I R 1922 Mad 457, *Gopala v Narayana Swami*, 23 L W 528 A I R 1926 Mad 681.

The Judicial Committee of the Privy Council applied this Article to a suit brought by a co sharer of an estate to recover his share from the other co heirs in possession of the estate, in a case of intestacy—*Maung Tun v. Ma Thit*, 44 Cal 379 (P. C.), 21 C. W. N. 527, 10 Bur L T. 138, 35 Ind Cas 809.

The Bombay High Court has also held that this Article applies to every suit where the plaintiff seeks to recover a distributive share of the property of an intestate, irrespective of whether the defendant is under a legal obligation to distribute it or not and that the decision of the Privy Council in *Maung Tun v Ma Thi*, (44 Cal 379) displaced the previous rulings on this point—*Shirinbai v Ra'anbai* 43 Bom 845 (860). The Calcutta High Court has also applied this Article to a case in which the suit was brought not against the executor but against the legal representative of an executor who was in possession of the assets—*Akhetramoni v Dhirendra* 41 Cal 271 (274). (But the old view has again been adopted in the recent case of *Sourab v Abbas Ali*, A I R 1926 Cal 480, 91 Ind Cas 725). The Rangoon High Court also holds (following the Privy Council decision) that this Article is applicable to a suit by one co heir against the other co heirs for a share in the corpus of an inheritance—*Maung Po v Maung Shwe*, 1 Rang 405, A I R 1924 Rang 155 76 Ind Cas 855, *Ma Nan v Ma Shue*, 4 Bur L J 76 A I R 1925 Rang 233, 88 Ind Cas 609, *Ma Toh v Mg Lin*, 3 Rang 77 A I R 1925 Rang 228 92 Ind Cas 489, *Ma San v Mg Maung*, 5 Bur L J 4, 95 Ind Cas 514, A I R 1926 Rang 95.

A certificate of administration granted under Reg VIII of 1827 only indicates the person who for the time being is in the legal management of the property but does not constitute the holder of the certificate a representative of the estate for the purpose of distributing it among his co sharers. Therefore, a suit by certain co sharers of a *deshparde wala* to recover their allowance from a person who manages the estate under a certificate of administration does not fall under this Article but under Article 131—*Keshav v Narayana* 14 Bom 236 (241).

515 Suit for legacy.—This Article applies where the substantial claim is to recover a legacy, even though the legacy be not assented to by the executor, and whether or not the suit involves the administration of the whole estate—*Salebhai v Bas Safiabai*, 36 Bom 111 (113).

Where the legacy is an annual allowance and the plaintiff is receiving that allowance annually, a suit not to recover the legacy but to have it defined what the amount of the legacy is, does not fall under this Article—*Hemangini v Nabin Chand*, 8 Cal 788 (802).

The mere fact that in a suit for legacy there is a prayer for administration of the estate as ancillary to the claim for legacy, will not take the case out of this Article and bring it under Art 120—*Rajamannar v Venkatakrishnaya* 25 Mad 361 (364).

If a suit is brought by a person who is entitled under a will to a legacy and to a share of the residuary estate, but he does not ask for payment of the legacy nor for the ascertainment of the share of the residue but sets forth certain alleged acts of misconduct on the part of the defendants (who are administrators) with respect to their dealings with the property,

asks for an account *Held* that the suit must be treated as a suit for recovery of legacy from the defendants (and the plaint should be amended accordingly) under this Article and not as a suit for accounts—*Curseljee v Dadabhai* 19 Mad 425 (432)

Limitation —A legacy is payable one year after the testator's death. Consequently a suit for legacy is in time if brought within thirteen years after the testator's death—*Curseljee v Dadabhai* 19 Mad 425 (43) *Sri Raja Parthasarathy v Sri Raja Venkatadri* 46 Mad 190 43 M L J 486 A I R 1922 Mal 457 (476)

Moreover the legacies are not payable until there are available assets to pay them and therefore time under the statute does not begin to run until the executor or other person liable to pay it has in his hands money with which it could be paid—*Sri Raja Parthasarathy v Sri Raja Venkatadri Appa Rao* (supra) affirmed on appeal *Sri Raja Venkatadri v Parthasarathy* 48 Mad 312 (P C) 48 M L J 627 29 C W N 989 87 Ind Cas 374 A I R 1925 P C 105 Thus a Hindu widow claimed certain property as the heir of her deceased son. She bequeathed by will the income of the property before her death. Her title was disputed by another lady who claimed to be the adoptive mother of the deceased son. The validity of the adoption was challenged by the natural mother (testatrix) and litigation followed. After her death suits were filed by the beneficiaries under the will for the payment of the legacies. *Held* that the legacies did not become payable until the executor or other person liable to pay them had assets in their hands out of which to pay them and no one could have had in his possession any fund representing the income of the estate until it had been finally decided by the Court that the adoption was invalid. And the suits to obtain the legacies instituted within 12 years from the final decision of the Court declaring the adoption to be invalid were not barred by limitation—*Sri Raja Venkatadri v Parthasarathy* (supra)

516 *Suit for share of residue* —This Article applies to a suit by a residuary legatee to recover his legacy or share of legacy under a will and for an account for the purpose of ascertaining what that share is whether the suit is brought against the executor or against the executor's legal representative—*Khetramani v Dhirendra* 41 Cal 771 (274 275)

Where a will makes certain illegal dispositions of property a suit by the heir of the testator for setting aside the will and for recovery of the property so disposed of as undisposed-of residue falls under this Article and must be brought within twelve years from the date of the testator's death—that being the date on which the residue becomes payable—*Hemangini v Nabin* 8 Cal 788 (805)

This Article also applies where the claim is for the whole of the residue—*Aherodemony v Doorgamoney* 2 C I R 118 on appeal 4 Cal 455

517 *Suit for distributive share* —A suit by a Mobomedan (Mafilla) widow for her share in her husband's property is one for a distributive

share of the property of an intestate and is governed by this Article—*Kasmi v Ayishamma* 15 Mad 60 (61)

A suit not to recover a distributive share in the corpus of the estate but to recover the share of the profits which accrued after the death of the intestate falls under Article 120 and not under Article 123—*Maung Po v Maung Shwe* 1 Rang 405 A I R 1074 Rang 155

A suit by a Mahomedan widow to recover possession of the entire estate of her deceased husband on the ground that according to custom and entries made in the *qanun* *ul* *orz* she was entitled to succession and to inherit the entire property left by her husband is not a suit for a distributive share of property consequently Article 123 cannot apply Article 120 governs the suit as it is not provided for elsewhere—*Mahomed Riasat v Hasin Bonu* 21 Cal 157 163 (P C)

Where after the death of her mother a Muhammadan woman and the defendants have enjoyed the property in common and she is afterwards excluded by the defendants a suit by her to recover possession is not a suit for distributive share under this Article because the cause of action is not based on the fact of inheritance from the original owner but on the fact of dispossession and the suit is a suit for possession under Art 144—*Abdul Kader v Aishamma* 16 Mad 11 (63) (F B) This Article does not apply to the case of Mahomedans who succeeded to the property of a deceased relative and by agreement amongst them lives continue to own as tenants in common instead of dividing it To such a case the ordinary law (Art 144) applies and time begins to run against one tenant in common when the other tenant in common does some act the effect of which is either to exclude his co tenant from the joint property or deny his rights to share—*Kallangowda v Bibishaya* 44 Bom 247 22 Bom L R 936 *Airdin v Umrao* 45 Bom 519 (521) It is well known that in the case of an estate of a Hindu Buddhist or Mahomedan the heirs of a deceased person very often leave the estate undivided and either enjoy the profits jointly living in commensality or divide the profits among themselves In such cases Article 123 is inapplicable for the reason that the heirs have taken their shares but instead of dividing the property and enjoying their shares separately they have agreed to enjoy the whole property jointly There is therefore no property of the intestate left to distribute and Article 123 cannot apply When under such circumstances one of the heirs is excluded from joint enjoyment he sues to recover not a share in the estate of the deceased but his share in joint property The suit is one for partition and Article 142 or 144 will apply—*Ma Nan v Ma Shwe* 4 Bur L J 76 A I R 1925 Rang 233 88 Ind Cas 609 *Maung Po v Maung Shwe* 1 Rang 405 A I R 1924 Rang 155 76 Ind Cas 855 *Ma San v Mg Maung*, 5 Bur L J 495 Ind Cas 514 A I R 1926 Rang 95

Commencement of limitation—The plaintiff sued the defendant her distributive share of the property of her intestate husband The

defendant applied for letters of administration and obtained the order in 1902. The suit was brought within six years from that date. It was held that the suit was within time, that until the right to obtain letters of administration was determined the person entitled to represent the estate was unknown and time began to run from the date of the judgment directing the issue of the letters of administration to the defendant—*Syed Faye v Sitara* 15 C W N 107

A similar interpretation must be given to the words payable and 'deliverable' as used in this Article. A share in the property of an intestate would not be deliverable until the administrator to whom letters of administration had been granted had in his hands the share to be delivered, and similarly a legacy or a share in a legacy also does not become payable until the executor or other person liable to pay it has in his hands money with which it could be paid.—*Sri Raja Venkataswami v Parathasarathy* 48 Mad 312 (P C)

518 Effect of limitation.—The widow of a Parsi, who died in 1837 leaving two sons surviving him, took out letters of administration to the estate in 1838 and then solely possessed and enjoyed the property till her death in 1897 although she was entitled by law to a widow's share therein and the sons were entitled to the remainder. A suit was instituted by the sons in 1897 to recover their shares of the property. Held that their claim had become barred by this Article and their right to such shares had been extinguished under section 28.—*Natroji v Perozebai* 23 Bom 80

124.—For possession of Twelve When the defendant
an hereditary office years takes possession of the
office adversely to the
plaintiff

Explanation.—An hereditary office is possessed when the profits thereof are usually received or (if there are no profits) when the duties thereof are usually performed

519 Hereditary office.—This Article applies only where the appointment to the office is by succession through inheritance. If the office is not hereditary and the appointment is made by nomination this Article would not apply.—*Jagannath v Birbadra* 19 Cal 776 (779). A suit to recover possession of the office of Dharmakarta of a temple based on a right

by *prescription* and not on a hereditary right to the office, is governed by Article 120 and not by this Article—*Kudamba Rogaiachariar v Tirumalai*, 26 Mad 113 (115)

The plaintiffs sued for a declaration that they were hereditary *Khadims* of a certain Mahomedan *darga* and as such entitled to perform the duties attached to the office for 21 days in each month, and during that period to receive the offerings made by the worshippers at the *darga* it was held that the suit fell under this Article—*Sarkum Abu Torab v Rahaman Bulsh*, 24 Cal 83 (90)

Where a *shebait* does not appoint his or her successor as provided in the will of the founder and where there is no other provision for the appointment of *shebait*, the management of the endowment must revert to the heirs of the founder, and the office of *shebait* henceforth must be hereditary in the founder's family, a suit for possession of such an office falls under this Article—*Jagannath v Runjit*, 25 Cal 354 (364)

Where the testator appointed his wife trustee and the plaintiff as joint trustee, and directed that the succession thereafter should be hereditary, held that the office was hereditary. A hereditary office subject to a temporary incumbency by a person not in the direct line of succession is still an hereditary office—*Narayana v Nagappa*, 22 L. W. 870, A. I. R. 1926 Mad 245

520. Suit for possession of property—A suit to recover the hereditary managership of a temple and for possession of the properties of the temple is governed by this Article. There is no distinction as regards limitation between a claim to an office and a claim to the property of an endowment—*Gnanasamband v Velu Pandaram*, 23 Mad 271, 279 (P. C.). *Ram Prari v Nand Lal*, 39 All 636 (640). A suit to recover possession of a choultry building belonging to a charity by one alleging himself to be its hereditary trustee is governed by this Article—*Singaravelu v. Chokkalinga*, 46 Mad 525 (527), 43 M. L. J. 737

Therefore where the suit to recover the office of the trustee of a temple is barred, a suit to recover possession of the property of the endowment is also barred. At the same time the right to the property is also extinguished—*Golindasami v Dakshinamurthi*, 35 Mad 92 (94), *Gnanasambanda v Velu Pandaram*, 23 Mad 271, 279 (P. C.); *Ramanathan v Murugappa*, 27 Mad 192 (196); *Ram Prari v Nand Lal*, 39 All 636 (640); *Alagiriswami v Sundareswar*, 21 Mad 278 (287)

521. Other suits—A suit to assert the plaintiff's personal right to manage or control the management of the funds of a temple, by right of inheritance may fall under this Article—*Bahant v. Puran Mai*, 6 All. 1, at p. 10 (P. C.)

A suit for emoluments and honours of the office of *Adhyapakas* is governed by this Article—*Ugunath chinnar v Tiruvengada*, 8 Ind Cas, 883.

An alienation of the management of a temple by the hereditary

is void and does not require to be set aside. Article 91 therefore does not apply to a suit brought by the succeeding trustee to recover the estate from the alienee. This Article will govern the suit—*Narayanan v Lakshmin*, 39 Mad 456 (459).

A suit by existing *karnams* for a declaration that the appointment of another person as *karnam* jointly with them is void, is not a suit for possession of the office of *karnam* (since the plaintiffs are already in possession) and this Article does not apply—*Lakshminarayanappa v Venkatarathnam*, 17 Mad 395 (396).

A suit by a *shebait* to have the conduct of the worship of a *thakur* and the custody of his image placed in proper hands would fall under this Article or Article 144—*Gossami Sri Gridharis v Romanlalji*, 17 Cal 3, at p. 22 (P. C.).

522 Limitation—Limitation runs when the defendant takes possession of the office adversely to the person entitled to it, and not when the plaintiff becomes entitled to the office. Thus, where a *stanom* holder purported to transfer absolutely his right of management of the *devasom* properties, and his successor in the *stanom* brought a suit for recovery of the properties within 12 years of his succession to the office but more than 12 years after the date of the transfer by the preceding *stanom* holder, *held* that the suit was barred by this Article. The possession which had become adverse to the previous *stanom* holder became adverse to the present *stanom* holder as he derived his right to sue from the previous holder, within the meaning of the word 'plaintiff' as defined in sec. 2—*Raja of Palghat v Ramani Unni*, 41 Mad 4 (10), 33 M. L. J. 26, 42 Ind. Cas. 22. The word 'plaintiff' in the third column includes a person from or through whom the plaintiff derives his right to sue. Therefore where the defendant had held possession of the hereditary office adversely to the plaintiff's predecessor more than 12 years, the plaintiff's title to the office was extinguished by sec. 28—*Gnanasambandha v Velu Pandaram*, 23 Mad 271, 279 (P. C.), *Ram Piar v Nand Lal*, 39 All 636 (640), *Jagannadha v Ram Dass*, 28 Mad 197 (201).

523 Adverse possession—There can be no adverse possession so long as there is no lawful trustee who could claim to recover the office from the person who claims to hold it adversely—*Palaniyandi v Padumalai*, 18 Ind. Cas. 373, on appeal, 2 L. W. 723. *Umayurubhugam v Vasthina thasami*, 9 M. L. T. 485. Where the office of trustee was vacant for 24 years from 1883 to 1907, and the plaintiff was appointed trustee in 1907, and the defendant has been in possession of the office before 1907, it was held that the defendant's adverse possession commenced only from 1907, when the plaintiff was appointed—*Palaniyandi v Padumalai*, 18 Ind. Cas. 373 (Mad).

There can be no adverse possession of an office where the person holding it adversely was utterly incompetent to hold the office. Thus, the office of the *shebait* of a temple must be held by a Brahmin; if a non Brahmin

takes possession of the office such possession cannot be adverse to the real claimant for a non Brahmin is not competent to hold the office of shebut or to perform the duties of that office Possession by him for any length of time will not constitute adverse possession A suit against him will not be barred because every act of appropriation of the income of the temple property will constitute a fresh actionable wrong—*Jalanahar v Jharula* 4 Cal 244 (252) P C (reversing *Jharula v Jalandhar* 39 Cal 887)

Where the right of trusteeship together with the temple and its endowments is alienated by a Hindu widow (who was the trustee) in favour of the defendant, a suit by the reversioners for a declaration of the invalidity of the alienation made by the widow and for possession of the temple properties brought more than twelve years after the alienation but within three years after the widow's death is barred in as much as it is one for recovery of an hereditary office and governed by Art 124 not by Art 141 There is no distinction between an alienation made by a female trustee and that made by a male trustee the plaintiffs derived their title through the widow and the possession of the defendant against her became adverse to the plaintiffs also—*Jagannadha v Rama Dass* 28 Mad 197 (200 201)

Where after the death of the last trustee of a public religious institution, the office devolved by inheritance on his male descendants by his two wives and the management was for a time conducted by the two branches respectively in rotation but afterwards the members of the junior branch had discontinued possession of the immoveable properties belonging to the trust as also the performance of the duties appertaining to the office and the members of the senior branch had been in turn successively in possession of the properties and had performed the duties to the exclusion of and adversely to the members of the junior branch for more than 12 years held that the right of the members of the junior branch as a body had been extinguished and not the right of this or that individual member only and the members of the senior branch as a body had acquired the sole management of the trust—*Ramanathan v Murugappa* 27 Mad 192 (196 197)

Adverse possession by the defendant may be tacked on to the previous adverse possession of his predecessors in office Therefore where in a suit under this Article it was found that the defendant was in adverse possession of the office of *archaka* for 3 years but his predecessors were successively in adverse possession for over sixty years the suit was held to be barred—*Krishnaswami v Veeraswami* 36 M L J 93 49 Ind Cas 333

For other notes on the subject see under Article 144

125 —Suit during the Twelve The date of the alienation
life of a Hindu or years
Muhammadian female
by a Hindu or Muha

himadan who, if the female died at the date of instituting the suit, would be entitled to the possession of land, to have an alienation of such land made by the female declared to be void except for her life or until her re-marriage.	Twelve years.	The date of the alienation
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521. Scope of Article.—The right to sue under this Article belongs only to the nearest reversioner even though such reversioner be a female entitled only to a woman's estate in the property.—*Bhagwant v Sukhi*, 22 All 33 (F B) at p 41

A suit by the remote reversioner is governed by Art 120, not by Art 125.—*Kalawathai v Thiruchathi*, 10 M L J 229, *Venkata v Tuljaram* 1917 M W N 30 *Guntupalli v Guntupalli* 24 M L J 183 *Anandi v Rani Sahai* 27 O C 173 *Devraj v Shivram*, 70 P R 1914, 23 Ind Cas 463 *Thakur v Ganeshi* 15 P R 1916 *Abinash v Harinath* 32 Cal 62 (71) *Kuntwar v Bindrabai* 37 All 195 (202), *Bhagwant v Sukhi*, 22 All 33 (F B)

The Madras cases cited above seem to be no longer good law in view of the opinion expressed in two Full Bench cases that the first column of Article 125 may be so construed as to comprehend a remote reversioner allowed by law to sue in place of the nearest reversioner, and that a suit by a nearest reversioner contemplated by Article 125 is a representative suit brought on behalf of all the reversioners immediate or remote; in other words, a suit by a remote reversioner is also governed by this Article.—*Chiruvolu v Chiruvolu* 29 Mad 390, at pp 409, 411 (F B), *Varamma v Gopalada ayyi*, 41 Mad 659 (F B.)

This Article applies only to a suit by a reversioner for a declaration that an alienation made by the widow is not binding on the reversioner, but a suit by a reversioner for a declaration that an adverse possession set up by the defendants (who were originally tenants) in respect of certain properties is not binding on the reversioner, and that he is entitled to succeed to the properties on the death of the widow, is not a suit under Article 125 but is governed by Article 120.—*Ramaswami v. Thayammal*, 26 Mad 489 (190)

Article 125 provides for the case of a reversioner who seeks to challenge the alienation made by a Hindu female or other limited owner; it does not apply where the alienation was made by a transferee from a Hindu female

limited owner or by a stranger holding under her—*Bolbaddar v Prag*
Dat 41 All 492 (522)

Moreover this Article applies to a suit brought during the lifetime of the female who made the alienation. If the alienation was made by the plaintiffs' maternal grandmother and the plaintiffs bring the suit after the death of the maternal grandmother and during the lifetime of their mother, the suit does not fall under this Article but under Article 120—*Bhagwanta v Sukhi*, 12 All 3, at p 41 (F B) *Narayana v Rama*, 38 Mad 396 (377)

This Article does not apply where the alienation was not made by the female herself, but was made during her minority by her guardian. A declaratory suit in respect of such alienation falls under Article 120—*Das Ram v Tiriha Nath*, 51 Cal 101 (108)

This Article would apply where the suit is brought by a person who was a remote reversioner at the time of the alienation, but who is the immediate reversioner at the time of institution of the suit, *cf* the words of the Article, "who if the female died at the date of instituting the suit would be entitled to possession". Thus where the alienation was made by a female (the daughter of the plaintiff's uncle) in 1896, when the plaintiff's father was the immediate reversioner and then his father died without questioning the alienation and thereupon the plaintiff instituted the suit in 1909 *held* that the suit fell under Article 12, because the plaintiff was a person who would be entitled to the possession of the land if the female died at the date of institution of the suit—*Veerayya v Gangamma*, 36 Mad 570 (572)

525 Alienation.—Where a creditor of the deceased male holder brought a suit against the widow for recovery of the debt and in execution of the decree in that suit brought certain properties to sale *held* that this did not amount to an alienation by the widow—*Chhaganram v Bai Motigauri*, 14 Bom 512 (515)

But it is not necessary that the 'alienation' contemplated in this Article should be made by a written document. It is sufficient if the act of the female necessarily resulted in the transfer of the estate to the transferee. Therefore, the action of a Hindu widow, in causing a collusive suit to be brought against her and confessing judgment therein whereby the plaintiff in that suit got a decree for possession of property of which the widow was in possession holding a Hindu widow's estate amounted to an "alienation" of such property within the meaning of this Article—*Sheo Singh v Jeons*, 19 All 524 (526). Similarly, the widow's act of allowing a decree to be passed on a fictitious award by which the whole property of her husband was divided among certain female members of the family who thereby took absolute estate in the shares allotted to them, amounted to 'alienation' of the property—*Ram Sarup v Ram Dei*, 29 All 239 (242, 243)

mmadan who if the female died at the date of instituting the suit, would be entitled to the possession of land to have an alienation of such land made by the female declared to be void except for her life or until her re-marriage	Twelve years	The date of the alien- ation
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A suit by the remote reversioner is governed by Art 120, not by Art 125—*Kalawathal v Thirubathi* 10 M L J 229 *Venkata v Tularam* 1917 M W N 30 *Guntupalli v Guntupalli* 24 M L J 183 *Aranzi v Ram Sahai* 27 O C 173 *Devraj v Shuram* 70 P R 1914 25 Ind Cas 463 *Thakur v Ganeshi* 15 P R 1916 *Abinash v Hari Nath* 3 Cal 67 (71) *Kunwar v Pindroban* 37 All 195 (202) *Bhagwati v Sukhi* 22 All 33 (F B)

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limited owner or by a stranger holding under her—*Balbhaddar v Prag Dai* 41 All 492 (522)

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But it is not necessary that the alienation contemplated in this Article should be made by a written document. It is sufficient if the act of the female necessarily resulted in the transfer of the estate to the transferee. Therefore the action of a Hindu widow in causing a collusive suit to be brought against her and confessing judgment therein whereby the plaintiff in that suit got a decree for possession of property of which the widow was in possession holding a Hindu widow's estate amounted to an alienation of such property within the meaning of this Article—*Sheo Singh v Jeoni* 19 All 524 (526). Similarly the widow's act of allowing a decree to be passed on a fictitious award by which the whole property of her husband was divided among certain female members of the family who thereby took absolute estate in the shares allotted to them amounted to 'alienation' of the property—*Ram Sarup v Ram Dei* 29 All 239 (242 243)

A compromise made by a Hindu widow in respect of her deceased husband's estate by which certain moveable and immoveable properties of her husband are partitioned amounts to an alienation and is not binding on the reversioner even though it has been followed by a decree of the Court—*Sohan Bibi v Hiran Bibi* 2 Ind Cas 180 (All) To see whether a compromise amounts to an alienation the test is to find out whether the property is claimed by the opposite party by a title before the compromise or whether he has first derived his title thereto by virtue of and under the compromise—*Gadiraja v Venkiah* 26 M L T 180 53 Ind Cas 271 Thus a widow alienated the property and after her death the daughter sued to set aside the alienation but subsequently compromised the suit by an agreement by which she acknowledged the validity of the widow's alienation and relinquished her claim In a declaratory suit brought by the daughter's sons it was held that the compromise by the daughter did not amount to a fresh alienation—*Ibid*

The creation of occupancy rights by a widow is an alienation and is invalid as against the right of the reversioner and the cause of action accrues when the occupancy rights are created—*Hira v Chathu* 1915 P L R 115

A suit on a mortgage was brought against a widow in 1900 and the widow at first contested the suit but later on abandoned her defence A decree was obtained in that suit and the mortgaged property was sold in 1902 in execution of that decree The reversioner brought the present suit in 1912 to set aside the sale It was held that the widow's act of withdrawing the defence in 1900 could not be said to amount to an alienation To constitute alienation it must be clearly proved that the widow had done an act which necessarily resulted in the transfer of the property Moreover the Court sale cannot be treated as a private sale To justify us in treating the Court sale as a private sale by the widow it must be shewn that it was the necessary result of some collusive arrangement made by her to use the Court as a medium or in other words that she intended to transfer the property by means of a Court sale and took steps to bring it about—*Ranga Row v Ranganayaki* 35 M L J 364 47 Ind Cas 578

525A Starting point of limitation—The period of limitation runs from the date of the alienation If the reversioner was a minor at the date of the alienation then by the application of secs 6 and 8 he is entitled to institute his suit within three years after he attains majority even though more than 12 years after the date of alienation—*Veerayya v Gangamma* 36 Mad 570 (572) It should be noted that this point has not been overruled by the Full Bench case of *Paramma v Gopaladasayya* 41 Mad 659 because the question directly arising in the Full Bench case was in relation to a suit brought by a person born after the date of alienation and not to a suit by a person who was a minor at the date of alienation See 41 Mad 659 at p 671

A Hindu widow alienated some of her husband's property in 1874; her daughters sued in 1892 to have the alienation set aside, but withdrew the suit on the ground that the alienation was valid. The daughter's sons sued in 1895 for a declaration that neither the original alienation nor the withdrawal of the suit affected their rights. *Held* that the withdrawal of the suit in 1892 was a confirmation of the alienation of 1874 and gave the plaintiffs a fresh cause of action, so that the present suit was not timebarred.—*Mullapudi Ratnam v Mullapudi Ramayya*, 25 Mad 731. But in 35 M L J 364 cited above, the withdrawal of a suit was held not to amount to an alienation or to give a fresh cause of action. Similarly, in 26 M L T 180, 53 Ind Cas 171 (cited above) a compromise of a suit did not give a fresh starting point for limitation.

526 Effect of bar of limitation.—Although the nearest reversioner may be debarred by lapse of time from bringing a suit under this Article, the remote reversioner will not necessarily be barred likewise. The principle is that one reversioner does not derive his title through another, but all of them claim from the last full owner, therefore limitation against a nearer reversioner does not operate as a bar against a remote reversioner.—*Abinash v Harinath*, 32 Cal 62 (71); *Bhagwanlal v Sukhi*, 22 All 33 (F. B). The Madras High Court however holds that a suit by a reversioner to set aside an alienation by a Hindu widow is a representative suit on behalf of all the reversioners, then existing or thereafter to be born, and all of them have but one cause of action, which arises on the date of the alienation. Hence, if by failing to sue within 12 years allowed by Article 125, the existing reversioners become barred by limitation, the reversioners thereafter born are equally barred.—*Varamma v Gopaladasayya*, 41 Mad 659 (F. B). A similar view has been expressed in *Chiruvolu v Chiruvolu*, 29 Mad 390 (F. B). The Judicial Committee have also expressed the view that the reversioner's suit in such cases is a representative suit in which he represents not only himself but the whole body of possible reversioners.—*Venkata narayana v Subbammal*, 38 Mad 406 (P. C.). *Janaki Ammal v. Narayana sams*, 39 Mad 634 (P. C.).

Further, it should be noted that this Article applies only to suits filed during the lifetime of a female for obtaining a declaratory decree. If, however, no suit is filed during her lifetime by the presumptive heir, a separate right, viz, the right to immediate possession, arises on the death of the female.—*Prosanna v. Afsolonnessa*, 4 Cal 523 (525). In other words, where a reversioner neglects to sue for a declaration that an alienation made by the widow is invalid and not binding on him, within the time allowed by this Article, he does not thereby lose his right to question alienation on the death of the widow by instituting a suit for possession (Art 141) to dispute the alienation on such evidence as may be available.—*Bapayya v. Alamma*, 36 Ind Cas 255 (Mad).

Chiruvolu, 29 Mad 390, 408 (F. B); *Mesraw v. Girijanundan*, 12 C. W. N. 857 (859).

<p>126 — By a Hindu governed by the law of the Mitakshara to set aside his father's alienation of ancestral property</p>	<p>Twelve years.</p>	<p>When the alienee takes possession of the property.</p>
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527 Scope of Article — This Article applies to suits to 'set aside' a father's alienation, i. e. to cases where immediate relief is sought; it does not apply to a suit for a mere declaration that an alienation made by the plaintiff's father and the widow of his father's divorced brother would not affect his reversionary rights—*Dev Raj v. Shivarani*, 70 P. R. 1914, 25 Ind. Cas 463. Such a suit falls under Article 120.

A suit not for a declaration of the invalidity of the alienation but for annulment of the sale, is governed by this Article and not by Article 120, and it is not necessary for a suit under this Article that the plaintiff should pray for possession of the property, along with the prayer for annulment—*Gokha Ram v. Sham Lal*, 3 Lah. 426 (430), A. I. R. 1923 Lah 268.

Even if the plaintiff claims possession, the suit falls under this Article; the words 'to set aside a father's alienation' include also a suit in which possession is claimed—*Munni v. Ramasami*, 41 Mad. 630 (633).

This Article would apply even though the father alienated the property as the manager and guardian of his minor sons. Article 44 would not apply to such a case as there can be no guardian of coparcenary property—*Ganesha v. Amrikasami*, 1918 M. W. N. 892. But where a father alienated the property of his son which his son acquired from his mother, this Article cannot apply, because the property was not ancestral property—*Arumugam v. Pandiyan*, 40 M. L. J. 475, 62 Ind. Cas 630.

A suit by a son to obtain a share by partition of joint family property under the Mitakshara Law, the father's share having been sold in execution of a decree, is not a suit to set aside an alienation (for execution sale is not alienation), but one to which Art. 127 would apply—*Isuridutt v. Ibrahim*, 8 Cal. 653 (655).

The doctrine of right by birth in the son is wholly antiquated and inconvenient for modern times. The Privy Council (in 34 All. 296) have taken advantage of the texts relating to the father's power of alienation for antecedent debts to mitigate the inconvenience of that doctrine, and the legislature has provided by a special Article 126 for the perfection of the title of an alienee from the father when a Hindu son who wants to take

advantage of the antiquated Mitakshara law seeks to set aside such an alienation. It is significant that the alienation under Article 126 need not be for consideration. It is also significant that Article 126 applies alike to an alienee with and without notice. The Legislature has clearly fixed an overt and patent fact, namely the taking of possession of the property by the alienee as the event from which the period has to be calculated, so as to avoid as far as possible the difficult questions as to notice—*Munia Goundan v. Ramasami*, 41 Mad 650 (656)

528. Moveable property —A suit to set aside a sale of *brit jaymans* *bahis* purchased with ancestral funds, would be governed by Art 126. This Article refers to both moveable and immoveable property belonging to a joint family—*Kishen v. Shih*, 3 Ind Cas 505

529. When time runs —The cause of action accrues when the alienee takes possession, and no new cause of action arises on the death of the plaintiff's father. Thus, where the plaintiff's suit to set aside a sale-deed executed by his father in 1896 was dismissed, and then on his father's death in 1910 he again brought a suit in 1911 to set aside the sale-deed and to obtain possession, alleging that a new cause of action arose on his father's death, *held* that the second suit was barred, as it was brought more than 12 years after the alienee took possession, and further as the former suit operated as *res judicata* in respect of the latter suit—*Ramasami v. Panamamalai*, 26 Ind Cas 873

A family property owned in equal moieties by a Mitakshara father and A, his undivided son, was mortgaged with possession by them both to B in 1892. Afterwards in 1897, the equity of redemption in the entire property was sold to C by the father as though it were his self acquired property. In April 1898, C paid up the mortgage amount and obtained possession of the property from the mortgagee. On his father's death, A sold his half share to D, who then brought a suit in August 1912 against A, B, and C for possession of A's half share on payment of half the mortgage-debt. *Held* that the suit was governed by this Article, being in effect a suit by the son's transferee against the father's transferee to set aside the transfer by the father, and was barred, having been brought more than 12 years after C took possession (April 1898). Even if Article 126 did not apply, Article 144 did, and the suit was equally barred because when C took possession in 1898, he took possession as the sole owner of the equity of redemption of the entire property and not of the half share of the father only, consequently his possession became adverse from that date—*Munia Goundan v. Ramasami*, 41 Mad 650 (652, 658)

If the plaintiff was a minor when his father alienated the property, the provisions of secs 6 and 8 will apply. If the plaintiff fails to bring the suit within 3 years of his attaining majority (sec 8), it will be barred, and his right to the property will be extinguished—*Lachmi Narain v. Kishan Kishore*, 38 All. 126 (130)

Chirvolu 29 Mad 393 403 (F B) *Mesram v Girijanandan* 12 C W N. 857 (859)

126—By a Hindu govern Twelve When the alienee takes
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property

527 Scope of Article—This Article applies to suits to set aside a father's alienation: as to cases where immediate relief is sought, it does not apply to a suit for a mere declaration that an alienation made by the plaintiff's father and the widow of his father's divided brother would not affect his reversionary rights—*Dev Raj v Shivram* 70 P R 1914 25 Ind Cas 463 Such a suit falls under Article 120

A suit not for a declaration of the invalidity of the alienation but for annulment of the sale is governed by this Article and not by Article 120 and it is not necessary for a suit under this Article that the plaintiff should pray for possession of the property, along with the prayer for annulment—*Gokha Rai v Sham Lal*, 3 Lah 426 (430) A I R. 1923 Lah 268

Even if the plaintiff claims possession the suit falls under this Article the words to set aside a father's alienation include also a suit in which possession is claimed—*Munia v Ramasami* 41 Mad 650 (655)

This Article would apply even though the father alienated the property as the manager and guardian of his minor sons Article 44 would not apply to such a case as there can be no guardian of coparcenary property—*Ganesha v Amirhasani* 1913 M W N 892 But where a father alienated the property of his son which his son acquired from his mother this Article cannot apply, because the property was not ancestral property—*Arunagari v Pandiyan* 40 M L J 475 62 Ind Cas 630

A suit by a son to obtain a share by partition of joint family property under the Mitakshara Law the father's share having been sold in execution of a decree is not a suit to set aside an alienation (for execution sale is not alienation) but one to which Art 127 would apply—*Issuridutt v Ibrahim* 8 Cal 653 (655)

The doctrine of right by birth in the son is wholly antiquated and inconvenient for modern times The Privy Council (in 34 All 296) have taken advantage of the texts relating to the father's power of alienation for antecedent debts to mitigate the inconvenience of that doctrine and the legislature has provided by a special Article 126 for the perfection of the title of an alienee from the father when a Hindu son who wants to take

advantage of the antiquated Mitakshara law seeks to set aside such an alienation. It is significant that the alienation under Article 126 need not be for consideration. It is also significant that Article 126 applies alike to an alienee with and without notice. The Legislature has clearly fixed an overt and patent fact, namely the taking of possession of the property by the alienee as the event from which the period has to be calculated, so as to avoid as far as possible the difficult questions as to notice—*Munia Goundan v. Ramasami*, 41 Mad. 650 (656).

528. Moveable property —A suit to set aside a sale of *brui jayman* *bahis* purchased with ancestral funds, would be governed by Art. 126. This Article refers to both moveable and immoveable property belonging to a joint family—*Kishen v. Saib*, 3 Ind. Cas. 505.

529. When time runs —The cause of action accrues when the alienee takes possession, and no new cause of action arises on the death of the plaintiff's father. Thus, where the plaintiff's suit to set aside a sale-deed executed by his father in 1896 was dismissed, and then on his father's death in 1910 he again brought a suit in 1911 to set aside the sale-deed and to obtain possession, alleging that a new cause of action arose on his father's death, *held* that the second suit was barred, as it was brought more than 12 years after the alienee took possession, and further as the former suit operated as *res judicata* in respect of the latter suit—*Ramasami v. Vanamamalas*, 26 Ind. Cas. 873.

A family property owned in equal moieties by a Mitakshara father and A, his undivided son, was mortgaged with possession by them both to B in 1892. Afterwards in 1897, the equity of redemption in the entire property was sold to C by the father as though it were his self-acquired property. In April 1898, C paid up the mortgage amount and obtained possession of the property from the mortgagee. On his father's death, A sold his half share to D, who then brought a suit in August 1912 against A, B, and C for possession of A's half share on payment of half the mortgage-debt. *Held* that the suit was governed by this Article, being in effect a suit by the son's transferee against the father's transferee to set aside the transfer by the father, and was barred, having been brought more than 12 years after C took possession (April 1898). Even if Article 126 did not apply, Article 144 did, and the suit was equally barred because when C took possession in 1898, he took possession as the sole owner of the equity of redemption of the entire property and not of the half share of the father only, consequently his possession became adverse from that date—*Munia Goundan v. Ramasami*, 41 Mad. 650 (652, 658).

If the plaintiff was a minor when his father alienated the property the provisions of secs. 6 and 8 will apply. If the plaintiff fails to bring the suit within 3 years of his attaining majority (sec. 8), it will be barred, and his right to the property will be extinguished—*Lakshmi Narain Kishore*, 38 All. 126 (130).

If the son fails to bring a suit to set aside his father's alienation within the period prescribed by this Article, his right becomes extinct and the property becomes the property of the purchaser and ceases to be joint family property. Consequently, any other son or grandson of the alienor born after the expiry of the period of limitation can no longer question the alienation because the property having passed absolutely to the purchaser these sons or grandsons do not acquire any interest in the property and consequently no suit by them is maintainable—*Lachmi Narain v Kishan Kishore* (supra)

530 Suit by son born after date of sale —Plaintiff's father sold away all the family properties in 1885, the alienees eventually obtained possession in 1899. The plaintiff, who was born in 1901, brought a suit in 1910 to recover his share in the property. It was held that as the entire family property was sold away in 1885 there was no joint family property in which the plaintiff had an interest by birth, and therefore he could not question the sale—*Soundarajan v Saravana*, 30 M L J 592 34 Ind Cas 794 (1906)

127 —By a person	Twelve	When the exclusion be
excluded from joint-	years	comes known to the
family property to		plaintiff
enforce a right to		
share therein		

531 Joint family property —In order to bring a suit within this Article it will have to be shown that there had been joint family property and that the plaintiff had been excluded from the enjoyment of such property and therefore desires to enforce his right to share therein. The word excluded in this Article implies previous inclusion, and a suit contemplated by this Article cannot be maintained by a person who had never had any portion of the joint property—*Saroda Soondury v Doyamoyee*, 5 Cal 938 (1910). Consequently, this Article only applies to persons who are members of a joint family and claim a right to share in joint family property, upon the ground that he is a member of the family to which the property belongs—*Kartik v Saroda* 18 Cal 642 (615). Therefore, the provisions of this Article do not apply to a suit by a person who claims to inherit property as a daughter's son (who is not a member of the joint family)—*Mathura v Barkant* 11 C L R 312, or to a suit by a daughter who after her father's death left her father's family and had lived in her husband's house and never in her paternal residence with the members of the joint family, to such a suit Article 142 or 144 would apply—*Kartik v Saroda* (supra). So also Art 127 does not apply where the plaintiff is a stranger who had purchased a share in the joint family property from one of the members thereof who

has been excluded from possession—*Harendra v Aunardi*, 14 Cal 544 (545), *Ram Lakhi v Durga Charan*, 11 Cal 680 (682) *Bhaurao v Rakhmin* 23 Bom 137 (140), *Muthusami v Ramakrishna*, 12 Mad 292 To such a case, the rule of limitation in Art 136 or 144 applies—*Ram Lakhi v Durga Charan* (supra) *Bhaurao v Rakhmin* 23 Bom 137

A suit brought by the plaintiffs for a declaration that they and the defendants are the members of an undivided Ahyasantana family and that the plaintiff no 1 as the senior member of the family is entitled to have the lands registered in his name falls under this Article The words to enforce a right to share therein show that under this Article it is not necessary that the plaintiff should be able to claim a definite share and enforce partition, all that is necessary is that he should claim to be entitled to a share to the joint property, although that may be as under the Ahyasantana law, indivisible—*Muttakki v Thimmappa* 15 Mad 186 (191)

In order to bring a case under this Article, the plaintiff must prove that at the time he was excluded from the property in dispute it was the joint property of an existing joint family It is not enough that the property in dispute should have been joint family property at some previous period—*Gajraj v Sadho*, 16 Ind Cas 882 (883) Where a joint family property is actually divided and one of the co sharers subsequently deposits money which he has received for his share with another co sharer, that money is no longer joint family property and a suit to recover it does not fall under this Article—*Ahmed Ali v Husain Ali* 10 All 109 (114)

Where a member of a Hindu family is divided in status from others, and is in enjoyment of some portion of the family properties while others enjoy other portions he is not in law excluded or ousted from those other portions In such a case Article 127 cannot apply because the plaintiff is not a person excluded from joint family property but only a tenant-in-common excluded from the common property—*Kumarappa v Samnatha* 42 Mad 431 (439) followed in *Yerukola v Yerukola* 45 Mad 648 (653) 42 M L J 507

Where the greater portion of the properties has been divided and the parties live separately, (i.e., where the family has been divided in status) and then a member recovers a debt due to the family (which was left undivided at the time of partition) the debt so recovered is not the property of a joint family and a suit to recover a share therein is not governed by this Article—*Vaidyanatha v Aiyasamy* 32 Mad 191 (191), *Thakur v Parlab* 6 All 442, *Banoo v Doona* 24 Cal 309 *Yerukola v Yerukola* 45 Mad 648 *Gajraj v Sadho* 16 Ind Cas 882 (883) Where, however at the time of partition one of the members is a minor and continues undivided from and under the guardianship of another, who afterwards collects certain debts due to the family, it will be open to the guardian to say that he did not realise the minor

of the debt on his behalf as it was his duty to protect the minor's interests and he would have been guilty of dereliction of duty if he had omitted to do so. Where therefore he collects any such debts, he will be considered to have recovered the minor's share on behalf of such minor and the minor can recover his share within the period provided by Art 127—*Vaidyanatha v Asyasamy* 32 Mad 191 (199)

Where money belonging to the joint family was realised by one member of the family to the exclusion of the other members while the family was joint and then a partition was effected by the members a suit for recovery of the money brought *after partition* is not governed by Article 127 because it is no longer joint family property. The suit ought to be instituted within three years from the date of separation or partition—*Jagat Singh v Achhaibar*, 26 O C 191 A I R 1912 Oudh 15 following *Gajraj v Sadhu* 15 O C 397

The members of a joint family made a partition of family property reserving certain land and the capital and assets of their family businesses which remained under the control and in the possession one of the members for future partition. The plaintiff who was a member of the family demanded his share in the undivided property but the person in possession refused to give effect to his claim. He thereupon sued for his share. *Held* that the property in question was undivided coparcenary property notwithstanding the partition and the suit fell under this Article and time ran from the date of refusal and not from the date of the previous partition—*Muthusami v Nallakulantha* 18 Mad 118 (41). See also *Ranachandrar v Narayana* 11 Bom 216 (219)

A suit to obtain a share by partition of a joint family property the interest of the plaintiff's father having been sold in execution of a decree falls under this Article and time ran from the date of attachment of the property in as much as the plaintiff became aware of the alleged exclusion from that date—*Issuridutt v Ibrahim* 8 Cal 653 (655)

532 Muhammadan family property.—The words joint family property in this Article mean the property of a joint family and not property which, although it may not have been divided yet belongs to a family which is not joint and hence this Article does not apply to the undivided property of a family governed by the Mahomedan law, because each member thereof holds his share in severalty—*Imme Isha v Zia Ahmed* 13 All 282 (1 B). So also in *Mohideen v Syed Meer Sahib* 38 Mad 1099 *Patcha v Mohidin* 15 Mad 57 *Commercial Bank v Alla oodeen* 23 Mad 583 (589) and *Imbichi v Syed Ali* (1912) M W N 45 it has been held that this Article refers to joint family property in the Hindu sense of the term and is inapplicable to Mahomedans. If the members of a Muhammadan family succeed to the property on the death of a relation each of them takes a share of each item of the property, and the article of the Limitation Act which would apply to a suit for a share would be Article 123 which deals

with a suit for a distributive share of the property of an intestate—*Mohideen v Syed Meer Saheb*, 38 Mad 1099 (1101). This Article does not apply to a suit by Mahomedans for possession by right of inheritance of shares in the property of their deceased ancestor—*Mahomed Akram v Anarbi*, 22 J Cal 934. *Poyram v Lakku Khan* 7 C W N 155

The Bombay High Court in an earlier case (*Barasha v Masumisha*, 14 Bom 70) held that this Article applied to a suit by a Mahomedan for partition of joint family property but now it has changed its view. It has been recently held by a Full Bench of that High Court that this Article does not apply to the property of a Muhammadan, or any other person not being a Hindu and not having been proved to have adopted as a custom the Hindu law of joint family—*Ishap Ahmed v Abhramji*, 41 Bom 588 F B (Jah J dissenting), *Jan Mahomed v Dutta Jaffer*, 38 Bom 449

533 'Excluded from property' --The sole occupation of the joint property by some of the members will not amount to ouster of the rest of the members or adverse possession against them, until there has been a disclaimer of the plaintiff's title by the assertion of a hostile title, and notice thereof to the plaintiff either direct or to be inferred from notorious acts and circumstances—*Ittapan v Manavikrama*, 21 Mad 153 (166), *Ujais v Umahanta*, 31 Cal 970 (973), *Barada Sundari v Annada Sundari*, 3 C W N 774, *Hari v Maruti* 6 Bom 741

In order to constitute exclusion there must be something to indicate that the plaintiff abandoned his claims to enjoy the family property or that the defendants to his knowledge excluded him from enjoyment. Oral renunciation by the plaintiff of his share is not valid enough to operate as exclusion against him—*Dhoorjesh v Dhoorjesh* 30 Mad 201 (202)

Mere exclusion from commensality is not sufficient—*Jeolal v Loke Narayan* 16 C W N 466 (17 C)

- As between brothers in a joint family where no partition is proved, the mere fact that one of the brothers went to live in a neighbouring village would not make the possession of the other brothers, who continued to live in the family house, necessarily adverse—*Jagjivandas v Bai Amba*, 25 Bom 362 (363)

Mere non participation in the profits by one and exclusive occupation by another would not constitute the exclusion of the former by the latter—*Ittapan v Manavikrama*, 21 Mad 153 (159). Thus the plaintiff was in Government service and was obliged to leave his native village entrusting the entire family property to the management of his undivided brother, the defendant. Later on the defendant wrote to the plaintiff, requesting him to take up the management of his share but the plaintiff refused to do so. It was held under the circumstances that the possession by the defendant had not been as his own to the exclusion of the p and the mere fact that the plaintiff who lived apart from the and did not participate in the profits of the property, did not.

inference of an exclusion from the property—*Dinkar v. Dhikari*, 11 Bom 365 (368).

A person who on his application for mutation of names is put upon the registry as sole occupier, cannot be deemed to hold the land as sole proprietor to the exclusion of the claims of the other members of the family as co-owners or of the claims for maintenance, because proceedings for the mutation of names are not judicial proceedings in which the title to and the proprietary rights in immoveable property are determined, as revenue authorities have no jurisdiction to pronounce upon such right or title. *A fortiori*, where a co-sharer in possession of the property makes gifts of lands to other co-sharers in the shape of maintenance, it is a strong evidence that the co-sharers are not excluded from the estate—*Nirman Singh v. Rudra Parthab*, 3 O W N 623 (P C), A I R 1926 P C 100, overruling *Rudra Parthab v. Nirman Singh*, A I R 1923 Oudh 61.

In the case of a Hindu widow, the mere fact that she did not participate in the profits of her husband's family property for more than twelve years, or that she refused to live with her co-widows (the defendants) did not amount to ouster or exclusion by the defendants—*Sellam v. Chinnammal*, 24 Mad 441 (443).

When one of two co-mortgagors redeems the entire property and retains possession of it that in itself is not sufficient to constitute adverse possession against the other co-mortgagor—*Moidin v. Oothumanganni*, 11 Mad 410 (417). The possession by a Mahomedan co-sharer of property which he has redeemed from the mortgagee does not become adverse to the other co-sharers until some exclusive title adversely to their proprietary right is set up—*Faki Abbas v. Faki Narudin*, 16 Bom 191 (196).

The fact that the plaintiffs were not excluded from their share in one part of the joint property does not prevent this Article from operating in respect of another part from which they had been excluded to their knowledge—*Vishnu v. Gonsk*, 21 Bom 325 (328). But this case has been dissented from in *Kumarappa v. Samsnatha*, 42 Mad 431 (439), in which it has been held that in order to constitute an exclusion under this Article there must be exclusion from the whole of the joint family property; mere exclusion from specific items of the joint property will not suffice.

When a member of the joint Hindu family becomes a convert to Islam, his very conversion is a proof of his exclusion from the membership—*Garga v. Begum*, 57 P R. 1916.

Where the Court of Wards took possession of an estate in 1898 purporting to act solely on behalf of the defendant and treating him as the sole heir thereto, and since 1898 it refused distinctly and repeatedly to recognise the plaintiffs' mother as the lawfully wedded wife of the late proprietor and the plaintiffs as his legitimate children, it was held that the possession by the Court of Wards was one on behalf of the defendant alone and it excluded the plaintiffs from any share or possession of the

estate since 1898. A suit brought in 1916 is therefore barred—*Narasimha v. Krishnachandra* 37 M. L. J. 256

Where a portion of a property was left undivided at a general partition and one of the co-sharers remained in sole possession of it for 35 years, that is a cogent evidence from which exclusion of the other co-sharers may be inferred—*Ravi Chunder v. Narayana* 11 Bom. 216. *Lakoba v. Narayan* 11 Bom. 221 (Note).

Two co-sharers executed a deed of partition in the absence of a third co-sharer (plaintiff's father) but the deed contained a clause to the effect that the plaintiff's father being absent from the village the other co-sharers (defendants) would manage his share during his absence and on his return hand over the share to him. He'd that although the plaintiff's father and the plaintiff had been admittedly out of possession for more than 12 years still as the possession of the share in question by the defendants had not been a possession of it as their own property to the exclusion of the plaintiff or his father no question of limitation arises—*Nila v. Govind* 10 Bom. 24 (27).

To entitle a person or a branch of an Aliyasantana family to participate in the property of the family the connection with the family must be kept up either by exercise of the right to share in the joint family property by joining in the *sacra* by intermarriage or otherwise. But when they have kept themselves completely separate from the family more than 12 years that will amount to evidence that they were excluded from the joint family and consequently their right to share therein is barred—*Muttakke v. Thirumappa*, 15 Mad. 186 (192).

534 When time runs.—Time would not run against the plaintiff until his exclusion from the property had become known to him: i.e. until there has been a disclaimer of the plaintiff's title by the open assertion of a hostile title by the defendant with notice to the plaintiff—*Itappan v. Manavikrama* 21 Mad. 153. *Ujala v. Umahanta* 31 Cal. 970. *Barada Sundari v. Sarada Sundari* 3 C. W. N. 774. *Harī v. Maruti* 6 Bom. 741: i.e. unless the plaintiff had intimation that the defendant intended to exclude him—*Malkappa v. Madhappa*, 37 Bom. 84. *Umrao v. Lachmi* (1917) P. L. R. 25. Thus the mere fact that the defendant had been in possession of the property in dispute for more than fifteen years without any claim having been made by the plaintiff would not make the defendant's possession adverse and time would not run against the plaintiff until he demanded a share of the property and was refused—*Harī v. Maruti* 6 Bom. 741 (742).

Where there is no allegation by the defendant that the plaintiff ever claimed and was refused his share in the family property a suit by the plaintiff to establish his right to a share in the joint family property cannot be barred by any lapse of time—*Hansji v. Valabh* 7 Bom. 207 (209).

535 Burden of proof.—As regards property the

The right to maintenance is one accruing from time to time according to the wants and exigencies of the person claiming it—*Varayanarao v Ramabai* 3 Bom 415 (P C) It is a constantly recurring right and therefore arrears can be claimed for 12 years before suit although arrears for previous years may be barred—*Ji v Rami* 3 Bom 707

129—By a Hindu Twelve When the right is for a declaration years denied of his right to maintenance

538 A suit for maintenance by a junior member of an *Aliyasanthana* family is one that falls under Article 129 because it is a suit to enforce a right to share in joint family property (the right to maintenance being the mode in which the right of a ownership is enforced) it does not fall under Article 129 because this Article applies to suits which are strictly for a right of maintenance in property belonging to another—*Maradevi v Pamakar* 36 Mal 203 (206) *Achutan v Kunjunn* 13 M L J 499

So long as there is no denial of a right limitation does not run in respect of a suit to establish the right although there may have been no payment or claim made—*Ramanamma v Sambappa* 12 Mal 347

Reading Articles 128 and 129 together it is obvious that though the right to maintenance may have been denied long before twelve years of the date of suit (Art 129) a suit for recovery of arrears of maintenance for 12 years preceding the suit can be maintained—*Ratnamasari v Ahilandammal* 26 Mad 291 (313)

In a suit under this Article the onus of proving the denial of the plaintiff's right to maintenance more than twelve years prior to suit lies on the defendant—*Rangappa v Kulantari* 26 M L J 205

130—For the resump Twelve When the right to re- tion or assessment years sume or assess the of rent free land. land first accrues

539 A suit for assessment of rent free land is governed by Article 130 but a suit to establish a right to assessment of rent is governed by Article 131—*Devendra v Jhumur* 43 C I J 387 A I R 1926 Cal 883, 95 Ind Cas 622

The period of limitation for a suit for resumption of a jaghir granted or life commences from the death of the grantee—*Mahadev v Jagatray* A I R 1924 Pat 298 71 Ind Cas 929

The period of limitation for a suit for assessment of rent runs from the time when a complete hostile right to hold the land rent free has been claimed by the defendant to the knowledge of the plaintiff—*Birendra v Roshan* 39 Cal 453 *Devendra v Jhumur* 43 C L J. 387 Thus, in a suit

Article 130, the right to receive rent in respect of the land is extinguished by operation of sec. 28, and the tenant's title to hold the land rent free is complete—*Sakharam v Trimbatra*, 45 Bom 634 (708) *Abhay Churn v Kally Pershad*, 5 Cal 949 (952) *Muthu Reddy v Anusuyabai*, 40 Bom 606 (613), *Birendra v Dilwar*, 13 Ind Cas 317 (Cal) *Keval Kuver v Taluqdari Settlement Officer*, 1 Bom 385 (390) Where a tenant has for over twelve years asserted to the knowledge of the landlord that he is under no obligation to pay rent, the claim to assessment of rent is barred—*Birendra Kishore v. Lakshmi*, 22 C. L. J 129, 30 Ind Cas 896, *Kali Mohan v Birendra Kishore*, 22 C. L. J 309, 31 Ind Cas 391

Twelve years' adverse possession against one holder of *saranjam* would operate to bar a claim on the part of a successor—*Madhava Rao v Anusuyabai*, 40 Bom 606.

131.—To establish a Twelve When the plaintiff is periodically recurring years first refused the right. enjoyment of the right.

540. Scope of Article —According to the Madras High Court, a suit to recover money due by reason of a periodically recurring right falls under this Article, as there is no other Article specifically providing for such a suit. The use of the word 'establish' and the fact that there is only one Article in the case of a suit with reference to a periodically recurring right and not two as in the case of suits based on rights to maintenance (see Arts 128 and 129) indicate that the Legislature intended that this Article would govern suits to obtain an adjudication as to the existence of a periodically recurring right as well as suits to recover money due under that right. If the Legislature had intended to confine the Article to the former kinds of suits only, it would have used the words "to obtain a declaration" (cf Article 129) and not the word 'establish'—*Zamora of Calicut v Achutha*, 33 Mad 916 (921) F. B. In another Madras case, *Ratnamasari v. Ahilandamma*, 26 Mad 291 (313, 314) although the scope of Article 131 was not in issue, still Bhasbham Ayyangar J in the course of his judgment remarked that Article 131 was not confined to a declaratory suit but would also include a suit for arrears due in respect of a periodically recurring right. In this case also it was pointed out that the expression used in this Article was not "for a declaration" but "to establish" which term would include a suit for a declaration as well as a suit to recover arrears of amount due. So also, in another case, where the suit was not for a declaration of a recurring right but for recovery of the actual amount payable thereunder, it was held that the plaintiff was entitled to recover twelve years' arrears up to the date of suit, under Article 131.—*Ilubi v. Kunhi Bai*, 10 Mad 115 (117) The above Full Bench decision overrules the case of *Balkrishna v Secretary of State*, 16 Mad 294 (295), in which it was laid down that this

Article applied only to cases in which a decree for some consequential relief was sought for by virtue of the periodically recurring right and that if only a declaration of the right was sought the suit fell not under this Article but under Article 126. In *Ramnad Zamindar v Dorasami* 7 Mad 341 (343) where the suit was only for a declaratory decree and not for any consequential relief it was held that Article 131 applied.

But it has been held by the Allahabad High Court and the Punjab Chief Court that the words 'to establish' do not extend and cannot be extended to cases in which the plaintiff seeks to recover specific sums of money due to him in respect of a periodically recurring right—*Luchmi v Turab* 34 All 246 (248) *Dost Muhammad v Sohan* 83 P R 1906. The Patna High Court also agrees with the view of the Allahabad High Court viz., that to establish means 'to obtain a declaration of and lays down that there is a vast distinction between a suit brought to establish a periodically recurring right and a suit brought to enforce payments due as remuneration for the performance of services arising out of that right. From a perusal of Articles 128 and 129 one of which applies to a suit for arrears of maintenance and the other by a Hindu for a declaration of his right to maintenance it is clear that the framers of this Act had clearly in mind the distinction between a suit for a declaration of a right and a suit claiming arrears of remuneration arising out of that right and had it been the intention to include both classes of suits under Article 131 the legislature would have used words appropriate to that effect. Article 131 has been intentionally drafted so as to include merely a suit to establish (i.e. to obtain a declaration of) a right—*Sri Sri Baidyanath Jiu v Har Datt* 5 Pat 249 7 P L T 465 94 Ind Cas 826 A I R 1926 Pat 205.

Thus Article does not refer to a periodically recurring liability but is concerned with a periodically recurring right only—*Khanderao v Raoji* 1 Bom L R 373.

541 Periodically recurring right—Instances —

(1) A right to receive burial fees whenever a corpse is brought to the burial ground for burial—*Bahar v Pero*, 24 W R 385.

(2) a right to *palla* or turn of worship of an idol for a certain period during the year—*Gopeekishen v Thacoordas* 8 Cal 807 *Eshan v Mon mohani* 4 Cal 683.

(3) a right to receive a monthly allowance from a Zemindary—*Ramnad Zemindar v Dorasami* 7 Mad 341.

(4) a right to a share in an annual allowance from the Government—*Raoji v Bala* 15 Bom 135.

(5) a right to receive a yearly payment out of the income of certain immoveable property which right has been settled by arbitration in the course of a suit—*Gajpat v Ghimman*, 16 All 189 (190) following *Chagan Lal v Bapubhai*, 5 Bom 68.

(6) a right to recover rent—*Mohammad Husain v Mohammad*

Bidi 13 A L J 333. *Jagannatha v Mulla* 14 M L J 477. *Alubi v Kun-*
hi 10 Mad 115.

(7) a right to recover additional rent for increased area—*Jatindra*
v Chandra, 6 C W N 360

(8) a right to a share in a pension—*Sakibunnissa v Hafiza* 9 All 213

(9) a right to a *tasdik* allowance due to the plaintiff's temple from the
 defendants' temple from year to year—*Satharam v Laxmipriya* 34 Bom
 349

(10) a right to a share in an allowance attached to a *deshpande vaian*
 —*Keshab v Narayan* 14 Bom 236

(11) a right to receive certain sums in perpetuity as *dastura*.—*Hem*
Chandra v Atul Chandra 19 C W N 386

(12) a right to payment of *dhara* or assessment of customary rent—
Ganesh v Sitabai 41 Bom 159

(13) a right to certain shares in the offerings of a temple—*Jagdeo v*
Mathura Prasad 22 O C 346

(14) a right to enhanced rent—*Brij Behari v Sheo Shankar* 2 P L
 J 124

A right to receive *malikana* annually is a periodically recurring right
 and a suit to establish the periodically recurring right pure and simple
 falls under this Article if it is treated as a suit for possession of an interest
 in immoveable property the proper Article applicable would be Article
 144. But where in the suit to establish a right to receive *malikana* annually,
 there is involved a further claim because that right carries with it a right
 to the property itself it cannot be said that it is purely a suit to establish
 a periodically recurring right. It may fall under Article 120—*Gopi Nath*
v Bhugwat 10 Cal 697 (708)

A perpetual right is not the same thing as a periodically recurring
 right. A claim that the plaintiff is the *mutawil* of a mosque and as such
 is entitled to all yeomiah allowances received by a rival claimant amounts
 to a perpetual right to receive the allowances and the fact that the sums
 of money are paid periodically does not make the right a periodically recur-
 ring right. Where the right is always vested in some persons to receive
 periodical payments and being vested in one person at one time passes
 away at another time to some body else such a right is a periodically
 recurring right in the true sense of the term—*Gulam Ghouse v Janni* 39
 M L J 492. A right to worship an idol for a sixth part of every year is
 a periodically recurring right governed by this Article but an exclusive
 right to worship an idol is not a periodically recurring right but falls under
 Article 120—*Eshan v Manmohini* 4 Cal 683 (685)

A suit for a declaration that the Zemindar is not entitled to recover
 from the tenant (plaintiff) any amount in excess of a stated sum by way of
 quit rent is not a suit to establish a periodically recurring right—*Sriman*
Madhabusi v Gopisetti 33 Mad 171 (171)

542 Arts 62 and 131 —In a suit to recover the arrears the important question is—who is the person sued? There is a distinction between the person originally liable to pay and a co sharer of the plaintiff who has actually received payment from that person. If the defendant is the person originally liable to pay Art 131 applies. If however the money is sought to be recovered from a co sharer who has received the payment then it is a suit for money received by the defendant for the plaintiff's use and Art 62 applies—*Sakharam v Lavmipriya* 34 Bom 349 17 Bom L R 157 *Harmukhgaurn v Harisukhprasad* 7 Bom 191 (193) *Desai Maneklal v Shivalal* 8 Bom 426 (432), *Dulabh v Bansidhar*, 9 Bom 1111 *Raoji v Bala* 15 Bom 135 *Chamanlal v Babubhai* 22 Bom 669. This principle was overlooked in *Chaganlal v Babubhai* 5 Bom 68.

543 Demand and refusal —There must be definite demand and refusal. The mere omission on the part of the person having the right to exercise it will not start a period of adverse possession under this Article—*Ginesh v Sitabai* 41 Bom 159 (162) 38 Ind Cas 54 18 Bom L R 950. The mere fact of the plaintiff's exclusion from enjoyment of his right for 12 years before suit would not bar his claim unless it were shown that such exclusion was the result of refusal made upon a demand—*Raoji v Bala* 15 Bom 135 *Devendra v Jhumur* 43 C L J 387 *Heri Chandra v Athi* 19 C W N 386. A mere refraining of the plaintiffs from demanding the right does not give a start to the period of limitation. It will run from the time when they were first refused the enjoyment of the right—*Hannan v Budh Singh* 146 P R 1882 *Zinat v Marlaza Khan* 108 P R 1901. Mere non-collection of the *Kattubadi* for a period of 1 year does not amount to a denial of the landlord's right to collect the same—*Jalasutram v Bori madevara* 29 Mad 47 (43). Where the right to the revenue of a certain land had been granted to the trustees of a temple the fact that no revenue was thereafter paid to the trustees by the owners of the land would not bar the suit of the trustees to recover arrears of revenue when it was found that the owners of the land *did not deny* that they were liable to payment of revenue to the persons entitled to claim it. The trustees could recover 12 years arrears under this Article—*Alubi v Kunhi* 10 Mad 115 (117). Mere non payment of rent or assessment does not amount to a denial of the landlord's right to recover assessment. There must be some overt act, such as refusal to pay the rent or assessment, before time begins to run—*Bhimabai v Swami Rao* 45 Bom 638 (646) 1 *Alkbar v Ramesh Chandra* 38 C L J 207, 72 Ind Cas 329 A I R 1923 Cal 392.

The refusal must be distinct and made against the plaintiff himself. Where in answer to a demand made by a member of the class to which the plaintiff belonged a member of the class to which the defendant belonged made a *general denial* of the right of the plaintiff's class such denial did not amount to a refusal of the right of the plaintiff—*Ramnad Zemindar v Dorasami*, 7 Mad 341 (343).

A mere omission on the part of a person having a right to assess the land, to exercise that right will not start a period of adverse possession. So that, if an inamdar continues to receive per annum certain fixed rent from his tenants for 60 years and has made no demand for the actual assessment in excess of the amount which the tenants had all along paid, that fact would not debar him from claiming assessment if he chose to do so, but once he claims assessment and the right to claim assessment is *denied* by the tenant, limitation begins to run against the inamdar—*Shri Bala v Sakharani*, 28 Bom L R 633 A I R 1926 Bom 345 95 Ind Cas 851.

Where the plaintiff asserts that there has been no demand and refusal within 12 years before suit, the *onus* is on the defendant to prove that the plaintiff has made a demand and that the defendant has refused—*Hemchandra v Atul*, 19 C W N 386 21 Ind Cas 179. Where the plaintiff is one of a family upon the members of which in turn devolves the performance of the duties of an office, it must be shown that the plaintiff's turn to perform the duties and receive the emoluments of the office occurred within 12 years before the suit was brought, and that he was then refused the enjoyment of his right—*Sinde v Sinde*, 4 B H C R, A C, 51.

The above rule, *viz.*, that the period of limitation would run only where there has been a definite demand and refusal, should be limited to cases where the circumstances are such that the mere non compliance with the right does not amount to a refusal. Thus, in 1874, the defendant purchased at a Court sale the right title and interest of the then inamdar, and since then had been in possession of the property, and no attempt was made by the inamdar or his successors to levy assessment or to recover possession until 1916, when the plaintiff as inamdar sued to recover assessment from the defendant. *Held* that the suit was barred. In such a case it was not necessary that there should be a definite demand before the period of limitation would begin to run. Because the circumstances were such that the non payment of any rent or assessment by the defendant to the plaintiff necessarily constituted a refusal within the meaning of this Article. If the relationship of landlord and tenant had ever existed between the parties, a demand would have been necessary before the period of limitation could run. But no such relationship ever existed in this case. Therefore, the plaintiff was first refused the enjoyment of his right in 1874, and the suit was barred. It should be noted that under the 3rd column, limitation runs from the time when the enjoyment of the right is first 'refused,' and not when the enjoyment of the right is first 'demanded and refused,' as in Articles 88, 89 and 103. The word 'demanded' has been deliberately omitted, so that where the defendant's act of non payment of assessment amounts to a refusal irrespective of demand, limitation runs from the non payment—*Bhimabhai v Swamirao*, 45 Bom 638 (647, 648), 23 Bom L R 100.

The right to levy assessment as a recurring right would accrue when there has been a demand and a refusal, only in those cases where the relati

its non payment and the mortgagor is entitled to pay the value of the grain instead of the grain itself the mortgagee is not entitled to claim, nor is the mortgagor bound to deliver grain consequently it is the money value of the grain debt that is really charged upon immoveable property

[The proposed amendment of this Article seeks to do away with all nice distinctions made above between cases in which the loan of paddy is promised to be returned in money (as the value of paddy) and the cases in which the loan of paddy is promised to be returned in paddy and Article 132 is intended to apply to all cases where loan is taken of grain and the obligation is charged upon immoveable property The amendment will have the effect of overruling 24 C L J 348]

546 Immoveable property —A tree for the purpose of limitation, comes within the meaning of immoveable property as used in Art 132 though for the purpose of registration it does not—*Kangal v Naoli* 9 Ind Cas 478 *Ram Gulam v Monohar Das* 1887 A W N 59

A decree is moveable property and a suit to enforce the hypothecation of a decree is governed by Art 120 But where the decree is converted into immoveable property that is where the mortgagor-decreeholder purchases certain immoveable property of his judgment-debtor in satisfaction of the decree the mortgagee is entitled to the substituted security and also to the larger period of limitation provided by this Article—*Jamna Dei v Lala Ram* 39 All 74 (78)

Money charged upon rents and profits of an estate is money charged upon immoveable property the rents and profits which in English law are classed as incorporeal hereditaments are by the law in India included in immoveable property—*Muhammad Zaki v Glalku* 7 All 120

A *nanhar* allowance payable out of the profits of a particular village is treated as money charged upon the village and is therefore money charged upon immoveable property within the meaning of this Article—*Ram Jiwan v Jadu Nath* 18 O C 380 *Deputy Commissioner v Jagjwan* 19 O C 49

A hypothecation of *jaghir* income is a charge upon immoveable property, because the *jaghir* income is a benefit to arise out of land within the terms of the definition of immoveable property as given in the General Clauses Act—*Ram Pershad v Kishen* 4 P R 1894

A *pala* or turn of worship is moveable and not immoveable property; consequently a suit to enforce a mortgage of a *pala* is not governed by this Article but by Article 120—*Narasingha v Prohadman*, 46 Cal 455 (457)

547 To enforce a charge —This Article applies to suits to recover money charged on immoveable property, by sale of that property it is inapplicable to a suit to recover money personally from the defendant, even though the money be charged on the property—*Ram Din v Kalka* 7 All 502, 506 (P C), *Miller v Runga Nath*, 12 Cal 389, *Chunilal v Bai Jethi* 22 Bom 846, *Lachmi Narain v Turabunnissa* 34 All 246 (248)

of landlord and tenant or landlord and occupant had ever existed. Once that right is established, then the non payment of rent or assessment would not be sufficient to enable the tenant to begin to set up a title by adverse possession. There must be some overt act, such as refusal to pay the rent or assessment, before time begins to run—*Akbar v. Ramesh Chandra* 38 C L J 207, A I R 1923 Cal 392

544 Effect of bar of limitation —A suit to establish a periodically recurring right must be brought within 12 years from the time when the plaintiff is first refused the enjoyment of his right, and if it is not brought within that time, not only is the right itself barred but any cause of action the plaintiff may have to recover arrears which rests on such right is also barred. If a plaintiff recovers in a suit arrears of periodical payments but apparently without a declaration that he has a right to such payments for the future, and then makes no claim for more than 12 years, any subsequent suit for the arrears of such periodical payments would be barred—*Shivram v Secretary of State* 11 Bom 222 (233)

132 —To enforce payment Twelve When the money sued of money charged upon years, for becomes due immoveable property.

545 Money —Where loan was taken of paddy and was promised to be returned with interest in paddy, a suit to realise the value of the paddy due by sale of the immoveable properties given by way of security, for the repayment of the loan is not governed by Art 132, either Art. 116 or Art 120 applies. The suit cannot be treated as a suit to enforce payment of money charged upon immoveable property—*Rashbehari v Kunjabehari* 24 C L J 348

But where loan was taken of paddy and promised to be returned in money (as the price of paddy) and the mortgage bond provided that on the expiry of the period mentioned in the bond the creditor would be entitled to recover the price of paddy with interest by sale of the property given as security for the repayment of the loan, it was held that money was charged upon immoveable property, in as much as the mortgagee was entitled to recover money and not specific paddy, and to such a case Art 132 applied—*Indra Narain v Dwijabar*, 47 Cal 125 23 C W N 949, *Jogendra v Mohan Lal* 23 C W N 951, *Mohesh v. Umesh*, 51 Ind. Cas 241 (Cal), *Sridhar v Ram Gobinda*, 29 C L J 368, *Dinabandhu v Bishnu*, 32 C L J 221, *Sripati v Sarat*, 22 C W N 790, *Ramchand v. Iswarchandra* 48 Cal 625, 632 (F B), 25 C W. N 57, 32 C L J 278. But in *Joy Narain v Mangobinda*, 64 Ind Cas 210 (Cal) and *Shamlal v Dhanwa*, 18 N L R 111, A I R 1922 Nag 23, it has been held that even where loan is taken of paddy and promised to be returned in paddy (with an additional quantity of paddy as interest), the suit to enforce the security falls under this Article because the mortgagee is entitled to claim the value of the grain in case of

its non payment and the mortgagor is entitled to pay the value of the grain, instead of the grain itself the mortgagee is not entitled to claim, nor is the mortgagor bound to deliver, grain consequently it is the money value of the grain debt that is really charged upon immoveable property.

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Money charged upon rents and profits of an estate is money charged upon immoveable property, the rents and profits, which in English law are classed as incorporeal hereditaments are by the law in India included in immoveable property—*Muhammad Zaki v Chaitu*, 7 All 120

A *nanhar* allowance payable out of the profits of a particular village is treated as money charged upon the village, and is therefore money charged upon immoveable property within the meaning of this Article—*Ram Jiwan v Jadu Nath*, 18 O C 380, *Deputy Commissioner v Jagjiwan*, 19 O C 49

A hypothecation of *jaghir* income is a charge upon immoveable property, because the *jaghir* income is a benefit to arise out of land within the terms of the definition of immoveable property as given in the General Clauses Act—*Ram Pershad v. Kishen*, 4 P R 1894

A *pala* or turn of worship is moveable and not immoveable property; consequently a suit to enforce a mortgage of a *pala* is not governed by this Article but by Article 120—*Narasingha v Prathadman*, 46 Cal 455 (457).

547. To enforce a charge.—This Article applies to suits to recover money charged on immoveable property, by sale of that property, it is inapplicable to a suit to recover money personally from the defendant, even though the money be charged on the property—*Ram Din v Kaika* 7 All 502, 506 (P C), *Miller v Runga Nath*, 12 Cal 389, *Chunilal v Bai Jethi*, 22 Bom 846, *Lachnis Narain v. Turabunnissa*, 34 All 246 (248),

of landlord and tenant or landlord and occupant had ever existed. Once that right is established, then the non payment of rent or assessment would not be sufficient to enable the tenant to begin to set up a title by adverse possession. There must be some overt act, such as refusal to pay the rent or assessment, before time begins to run—*Akbar v Ramesh Chandra*, 38 C L J 207, A I R 1923 Cal 392.

544 Effect of bar of limitation —A suit to establish a periodically recurring right must be brought within 12 years from the time when the plaintiff is first refused the enjoyment of his right, and if it is not brought within that time, not only is the right itself barred but any cause of action the plaintiff may have to recover arrears which rests on such right is also barred. If a plaintiff recovers in a suit arrears of periodical payments but apparently without a declaration that he has a right to such payments for the future, and then makes no claim for more than 12 years, any subsequent suit for the arrears of such periodical payments would be barred—*Shivram v Secretary of State*, 11 Bom 222 (233).

132—To enforce payment of money charged upon immovable property. Twelve years. When the money sued for becomes due.

545 Money —Where loan was taken of paddy and was promised to be returned with interest in paddy, a suit to realise the value of the paddy due by sale of the immovable properties given by way of security, for the repayment of the loan is not governed by Art 132, either Art 116 or Art 120 applies. The suit cannot be treated as a suit to enforce payment of money charged upon immovable property—*Rasabehari v Kunjabehari* 24 C L J 348.

But where loan was taken of paddy and promised to be returned in money (as the price of paddy) and the mortgage bond provided that on the expiry of the period mentioned in the bond the creditor would be entitled to recover the price of paddy with interest by sale of the property given as security for the repayment of the loan, it was held that money was charged upon immovable property, in as much as the mortgagee was entitled to recover money and not specific paddy, and to such a case Art 132 applied—*Indra Narain v Dwijabhar*, 47 Cal 125, 23 C W N. 949, *Jogendra v Mohan Lal*, 23 C W. N 951, *Mohesh v. Umesh*, 51 Ind Cas 241 (Cal), *Sridhar v Ram Gobinda*, 29 C L J 368, *Dinabandhu v Bishnu*, 32 C L J 221, *Sripati v Sarat*, 22 C W N 790, *Ramchand v Iswarchandra* 48 Cal 625, 632 (F B), 25 C W. N 57, 32 C L J 278. But in *Joy Narain v Mangobinda*, 64 Ind Cas 210 (Cal) and *Shamlal v Dhanwa*, 18 N L R. 111, A I R 1922 Nag 23, it has been held that even where loan is taken of paddy and promised to be returned in paddy (with an additional quantity of paddy as interest), the suit to enforce the security falls under this Article, because the mortgagee is entitled to claim the value of the grain in case of

purchaser of the creditor's claim to recover the abovementioned debt falls within Article 132, and is not a suit for money lent under Article 57—*Girish Chunder v Annundamoyi*, 15 Cal 66, 69 (P C) Where a testator charged all his real estate with payment of his debts, a claim against the testator's estate on a simple contract debt would be governed by the 12 years' rule—*Harburton v Stephens* 43 Ch D 39

Where by a bond the debtor hypothecated all his properties (my wealth and property) without specification held that the bond created a charge upon the immoveable property of the debtor although no particular property was specified in the land and a suit to enforce payment of the amount due out of an immoveable property belonging to the debtor was governed by this Article—*Ramsidd v Balgobind*, 9 All 158 (164) But in another Allahabad case, where the debtor stipulated that if the principal and interest were not paid up at the stipulated period, the creditor would be at liberty to recover the money, by instituting a suit, from "my moveable and immoveable properties, my own milk" it was held that the language of the bond was too vague to warrant the inference that the bond contemplated the creation of a mortgage of a definite estate and that a suit upon the bond was governed by Art 66, or 116, and not by this Article—*Collector of Etawah v Beli Maharani*, 14 All 162 (164)

Where maintenance is charged upon immoveable property, a suit to recover arrears of maintenance is governed by Art 132—*Ahmed Hossein v Nihaluddin* 9 Cal 945 (951) P C

Where immoveable properties were hypothecated to the principal by the agent as security for the proper discharge of his duty, a suit for accounts by the principal would be governed by Art 132 in as much as it is by implication a suit to enforce a charge—*Madhusudhan v Rakhal*, 43 Cal 248 (following *Hafezuddin v Jadu*, 35 Cal 298, and dissenting from *Jogesh v Benode*, 14 C W. N 122), *Troilokhya v Abinash*, 21 C. L. J 459 See Note 411 under Art 89

Where a guardian gave certain immoveable property as security for the due fulfilment of his duties to his ward, a suit by the latter to recover monies which might be found due on account being taken from the guardian, out of the property charged, falls under this Article—*Farul Nishan v. Muhammadji*, 33 P R 1897

Where a mortgage document expressly made the mortgaged properties liable not only for repayment of principal, but also for interest, the interest was held to be charged upon the property—*Vasudevan v Konurupellamanna* 2 L. W 853, *Davani v Ratna*, 6 Mad 417. As for interest after due date of mortgage, see note 483 under Article 116

Where several properties are liable for the payment of an annuity, which has been discharged by the owner of one of such properties, a for contribution by such owner against the owners of the other

is a suit to enforce a charge on the properties and is governed by this Article and not by Art 99—*Yakub v Kishen* 28 All 743 (746)

A mortgage bond executed by the father in a Mitakshara family for the benefit or necessity of the family and not being shown to have been effected for any immoral purpose is valid and binding on the sons and a suit to enforce that mortgage against the sons is governed by this Article—*Prankrishna v Jadu* 2 C W N 603 *Maheshwar v Kisen* 34 Cal 184 (190) *Sheo Narain v Mokshoda* 17 C W N 1022 19 Ind Cas 878 *Ran Singh v Sobha* 29 All 544 (551) *Jaleswar v Anrut* 35 All 302 *Aribudra v Dorasani* 11 Mad 413 (415) But where the mortgage is executed by the father to discharge a debt which is neither antecedent nor one for family purposes the mortgage is not binding on the sons and does not create a charge upon the entire family property but upon his individual share only and a suit brought after the death of the father so far as it claims to affect the shares of the sons is governed by Art 120 and not by Art 132 as there is no charge on immoveable property enforceable against the sons—*Brij nandan v Bidya Prosad* 47 Cal 1063 1092 (F B) 19 C W N 849

A claim for the balance of money due to a builder who undertook the erection of a building on the express stipulation that he would have a lien on the building for all sums due to him until paid is a claim for money charged upon immoveable property under this Article—*Daulat Ram v Wollen Mills* 95 P R 1908

If a pro note is first passed for a certain debt and subsequently immoveable property is hypothecated for the same debt a suit to recover the loan due under the pro note by enforcing the charge created by the hypothecation bond is governed by Article 132 and may be brought within 12 years from the date when the money became due although the creditor's remedy for enforcing the personal obligation (under the pro note) in respect of the loan may be barred—*Behari Lal v Beni Madho* 27 O C 263 A I R 1925 Oudh 92 79 Ind Cas 942

L purchased an oil well subject to a mortgage in favour of B and to a right of pre-emption in favour of N He made payments to the mortgagee B in part satisfaction of the mortgage-decree on the oil well such payments being necessary to save the oil well Held that L had a charge on the oil well for the amount paid as against N who exercised his right of pre-emption as well as against persons claiming through N and a suit to recover the amounts by enforcing the charge fell under Article 132—*Ma Lon v Ma Nya* 1 Rang 714 79 Ind Cas 766 A I R 1924 Rang 204

A trustee of a mosque making advances out of his own pocket to meet the expenses of the mosque no doubt acquires a charge upon the trust property but this charge is not like an ordinary charge which entitles a man to bring the charged property unconditionally to sale It is a charge which enables him to take the amount out of the rents and profits of the trust property or through raising monies by the creation of a similar charge

Article 132 was not intended to cover such a qualified charge, and the suit by the plaintiff for recovery of the money is governed by Art 120—*Abhan Sakeb v Soran* 38 Mad 260 (267, 269), following *Peary v Narindra*, 37 Cal 229 (P C)

Charge on moveable property —A suit to enforce a charge on moveable property is governed by Art 120—*Nim Chand v Jagabandhu*, 22 Cal 21 See notes under Article 120, at page 439 ante

Payment of revenue —Where Government revenue is paid by one of the co sharers of the estate to save the entire estate from sale, such payment does not create a charge in his favour upon the estate and a suit to recover such amount is governed by Art 99 and not by this Article—*Kinu Ram v Muzaffar*, 14 Cal 809 (F B) *Khush Lal v Pudmanund*, 15 Cal 542, *Shivrao v Pundlick*, 26 Bom 437 But in several other cases it has been held that such payment creates a charge—*Raja of Vizianagram v Rajah Setracherla* 26 Mad 686 (F B), *Alayahammal v Subbaraya* 28 Mad 493 (191), *Achul v Hara*, 11 Bom 313 See Note 443 under Article 99

But if the revenue is paid not by a co sharer but by a lessee in order to protect his interest in the estate, who thereafter brings a suit for the recovery of the amount, the suit does not fall under Article 99, which applies only to a co sharer, but is governed by this Article—*Ram Dutt v Horakh*, 6 Cal 549.

551. *Vendor's lien* —Unpaid purchase money creates a charge in favour of the vendor on the property in the hands of the vendee, and a suit by the vendor to recover it by enforcement of such lien or charge falls under Art 132, but where a personal remedy against the vendee is sought, Art 111 applies—*Virchand v Kumari*, 18 Bom 48, *Chunilal v Bai Jethi*, 22 Bom 846, *Har Lal v Muhands*, 21 All 454, *Munirunnissa v Akbar*, 30 All 172(174), *Rama Krishna v Subrahmania*, 29 Mad 305, *Rukan Din v Hasan Din*, 72 Ind Cas 897 (Lah) See notes under Art 111

552. *Co mortgagor's charge* —See secs 82 and 95 of the Transfer of Property Act

Where several properties belonging to several owners are mortgaged to secure the same debt, the owner of the property that has been made liable for more than its rateable proportion of the debt can claim contribution proportionately against the owners of other properties, and has a charge on the other properties under Section 82 of the Transfer of Property Act, and a suit to enforce the charge falls under this Article and not under Article 99—*Bhagwan v Karam Husain* 33 All 708, 716 (F B), *Ibn Husain v. Ramdas*, 12 All 110 (114)

Where a co mortgagor redeems the mortgaged property, he acquires a charge, under sec 95 of the Transfer of Property Act, on the share of each of the other co mortgagors, for his proportion of the mortgage money, and a suit to enforce the charge is governed by this Article—*Bhagwan Das*

v Hardes, 26 All 227, *Kotayya v Kotappa*, 49 M L J 117, A I R 1926 Mad 141, *Rajkumari v Mukunda*, 25 C W N. 283 Where there had been several payments in part satisfaction of a mortgage, the payment of the balance due is as much a redemption as the payment of the whole sum due in a case in which there has been no previous part payment. A co-mortgagor who pays the balance of the mortgage money and redeems the mortgage acquires a charge on the property under sec 95 of the Transfer of Property Act, and his suit to enforce the charge falls under this Article—*Hira Kuer v Palku* 3 P L J 490 (491)

It has been held in a Calcutta case that the co mortgagor gets a charge under section 95 T P Act only when he *redeems* and there can be redemption only so long as the mortgage subsists Where a decree on the mortgage has been obtained by the mortgagee, and an order absolute for sale has been passed under sec 89 of the T P Act, the security as well as the mortgagor's right to redeem are both extinguished and any payment made thereafter by a co mortgagor cannot be taken as payment by way of 'redemption', consequently no charge is created in favour of the person who makes such payment His suit to recover the money falls under Article 61 or 99 and not under Article 132—*Nawab Jahanara v Mirza Shujaiddin*, 9 C W N 865 (867) But the Bombay High Court holds that a charge is created in such a case—*Danappa v Yamnappa*, 26 Bom 379

553 Mortgagee's charge—Where a mortgaged property is sold for arrears of revenue, free from all incumbrances, the mortgage is invalid as against the purchaser, but the mortgagee is entitled to a charge on the surplus sale-proceeds, and a suit to enforce such charge is governed by this Article and not by Article 120—*Upendra v Mohri Lal*, 31 Cal 745 (751), *Kamala Kanta v, Adul Barkat*, 27 Cal 180 (184), *Unalara v Umacharan*, 3 C L J 52; *Jogeshw v v Ghanashyam*, 5 C W N 356 (359)

When a property is sold under a decree obtained by a first mortgagee in a suit in which the puisne incumbrancers were parties, it passes into the hands of the purchaser discharged from all incumbrances But the rights of the puisne incumbrancers are not extinguished or discharged by the sale, but transferred thereby to the surplus sale proceeds. A suit brought by a second mortgagee to enforce his lien on those sale proceeds in the hands of a third mortgagee who has notice of the second mortgage, and who has taken away the sale proceeds in execution of a decree obtained upon his mortgage, is governed by this Article and not by Article 120—*Berhamdeo v Tara Chand*, 33 Cal 92 (111, 112) affirmed on appeal to the Privy Council in 41 Cal 654, 661, (P C) Similarly, a suit by a prior mortgagee, for payment of his mortgage money out of the sale-proceeds remaining in the hands of a subsequent mortgagee who has foreclosed the mortgage and sold the property to a third person, is governed by this Article—*Visvanath v, Shankerlal*, 12 N L R. 90.

The right of a puisne mortgagee to redeem the prior mortgage is only ancillary to his right to work out his remedy against the mortgaged estate. He is only permitted to redeem for the purpose of working out his own security. The right of a puisne mortgagee to redeem the prior mortgage in a case where he has not been joined in a suit on the first mortgage is a right to redeem the first mortgage with the view of enforcing his own mortgage—it is only a means of securing the object of enforcing his own mortgage by sale. The proper Article applicable to the case is Article 132 and not 148—*Lakshmanan v Sella Muthu* 47 M L J 602 A I R 1925 Mad 76 84 Ind Cas 301. *Nilmadhab v Joygopal* A I R 1926 Cal 560, 91 Ind Cas 719, *Nidhiram v Sarbessur*, 14 C W N 439. *Appaya v Venkatramayya* 20 L W 620 A I R 1925 Mad 150 82 Ind Cas 864. But the Patna and Allahabad High Courts dissent from this view and hold that the second mortgagee's right of redemption cannot be considered as a right to enforce payment of money charged upon immoveable property, because the second mortgagee in a suit for redemption does not seek to recover the money due to him upon his second mortgage. His suit falls under Article 148 and not under Art 132—*Ranjhari v Kashinath*, 5 Pat 513 A I R 1926 Pat 337, 94 Ind Cas 284. *Priya Lal v Bohra Champa Ram*, 45 All 268, A. I R 1923 All 271.

554 When money becomes due—Where a mortgage-deed fixes no time for payment, time runs from the date of the bond. If there has been any payment of money to the mortgagee, time runs from the date of the last payment (sec 20)—*Niscomal v Kamini Kumar* 20 Cal 269 (172).

In case of a mortgage bond executed to secure a loan payable on demand, the words "on demand" should be construed as merely technical words meaning "forthwith" or "immediately" no actual demand is necessary in order to establish a starting point for limitation under Article 132, and time runs from the date of the bond—*Perianna v Muthusira* 21 Mad 139 (140); *Barkatunnissa v Madhub Ali* 42 All 70 (73), *Perumal v Alagiriswami*, 20 Mad 245 (248).

Where a second mortgagee discharges a decree obtained by the first mortgagee, he does not become an assignee of the decree and is not entitled to execute the decree, but he acquires a charge on the mortgaged property; and in a suit by him to enforce the charge, time runs from the date on which he made the payment in satisfaction of the decree—*Shib Lal v Munni Lal*, 44 All 67 (70). But the Patna High Court dissents from this view and holds that a puisne mortgagee paying off the decree obtained by the prior mortgagee becomes entitled only to the security held by the prior mortgagee, and the period of limitation for his suit to enforce the prior mortgage is to be counted from the due date of that mortgage. He does not acquire any fresh charge on the property from the date of his payment; consequently time does not run from the date on which he paid off

decree on the prior mortgage—*Sibananda v Jagmohan* 1 Pat 780 3 P L T 533 68 Ind Cas 707 A I R 1922 Pat 499 (dissenting from *Shib Lal v Munni Lal* 44 All 67) The Nagpur J C Court takes the same view as the Allahabad High Court viz that the period of limitation runs from the date when the puisne mortgagee made the payment and became entitled (under sec 74 Transfer of Property Act) to the rights created by the decree on the prior mortgage—*Suryabhan v Renuka* 8 N L J 232 (F B) 97 Ind Cas 118 A I R 1926 Nag 84 overruling *Nathuram v Sheolal* 13 N L R 217 42 Ind Cas 796 (where it was held that the period of limitation ran from the due date of the prior mortgage)

Where the surety of a mortgagor pays up the mortgage money he cannot be in a better position than the original mortgagee And so in a suit brought by the surety to recover the money from the mortgagor time runs from the same date as it would have run had he been the original mortgagee : i from the due date of the mortgage bond and not from the date when the surety paid off the mortgage—*Barkatunnissa v Mahbub Ali* 42 All 70 (74)

Where a co mortgagor redeems the mortgage his position is that of an assignee of the original security and the period of limitation for his suit to enforce his charge against the other co mortgagors is the same within which the original mortgagee could have brought his suit on his mortgage that is the period runs from the due date of the original mortgage—*Rajkumari v Mukunda* 25 C W N 283 57 Ind Cas 868 But the Oudh Court dissents from this ruling and is of opinion that limitation runs not from the due date of the mortgage which is paid off but from the date of payment by the co mortgagor—*Qamar Jahan v Munney Mirza* 12 O L J 313 2 O W N 413 A I R 1925 Oudh 613

554A Instalment mortgage bond —In the case of an instalment mortgage bond the principle of Article 75 should be applied in determining the starting point of limitation Thus where by a mortgage bond executed by the defendants the mortgage money was made payable by four instalments and in case of default in payment of any instalment the plaintiff might at his option sue either for the amount due on that instalment or for the whole amount due on the bond it was held that the whole amount became due when default was first made in the payment of an instalment and that limitation ran from the date of the first default and not from the expiration of the term of the mortgage bond—*Sitab Chand v Hyder* 24 Cal 281 (285)

Where a hypothecation bond provided for the repayment of the principal sum on a certain date with interest in the meantime payable monthly and further provided that on default in payment of interest the principal and interest should become payable on demand it was held that the period of limitation prescribed by this Article began to run from the date of the first default in the payment of interest and it was further held that no

actual demand was necessary to create the plaintiff's cause of action as the words "on demand" are merely technical words equivalent to 'immediately' or 'forthwith'.—*Perumal v. Alagirisami*, 20 Mad 245 (248). But if the bond provided that upon default of payment of interest annually, the principal would become due with interest at an enhanced rate from the date of the bond, whenever the creditor would make the demand it was held that the cause of action did not arise upon the first default in the payment of interest, but the liability of the defendant was made dependent on a preceding demand actually made by the plaintiff, till such demand was made, the defendant could not have considered the action as accruing against him, in such a case, the words "on demand" imported a condition, and were not merely technical words.—*Nettakaruppa v. Kumarasami*, 22 Mad 20 (22).

Where a mortgage-bond provided a period for repayment of the principal, and also provided that interest was to be paid annually, and that if the borrower made default in the payment of any instalment of interest, the creditor would have power to recover the whole amount due, held that limitation began to run from the period of the first default in the payment of interest, that being the date on which according to the terms of the bond the whole money became due.—*Nathi v. Turss*, 43 All 671 (672), 19 A L J 712, 63 Ind. Cas 886, *Collector of Jaunpur v. Jamna Prasad*, 44 All 360 (363), 20 A L J 104, 66 Ind Cas 171 *Ramdas v. Md Said Khan*, 20 A L J 346, 67 Ind Cas 160.

A mortgage bond dated 8th December 1895 provided a period of three years for the repayment of the principal; the mortgage-debt was to carry interest at Rs 30 half yearly, which must be paid half-yearly, and the bond further provided that if two periods of six months elapsed without interest being paid, the mortgagee was to have the option of maintaining the period of mortgage and suing only for the interest due, or of cutting short the mortgage period and suing for the whole debt, principal and interest. No interest was ever paid. Held that the cause of action for a suit for recovery of the whole debt arose on 8th December 1896 (i.e. upon two defaults in the payment of the six monthly interest) and not upon the lapse of three years mentioned in the bond.—*Sham Sundar v. Abdul Ahad*, 71 P R. 1915.

A mortgage provided that interest was to be paid every six months and that any interest remaining unpaid would at the close of the year be treated as principal and would thereafter carry interest at the bond rate. It further provided that in the event of non payment of interest for two consecutive half-years, the mortgagee would have the power to benefit himself by charging the compound interest aforesaid, or to realise at once the whole of the principal and interest without waiting for the term of the bond to expire, or to sue for the interest alone. Held that the mortgagee was given three options, and if he did not choose to exercise his option of

suing for the whole amount due on the occurrence of a default but chose instead the option of letting the interest go at compound rate it could not be said that time began to run against him from the date of the default—*Girdhari v Gobind Ram* 19 A L J 456 63 Ind Cas 25 But this case has been dissented from in the case cited below

In a mortgage bond it was stipulated that the principal was to be paid within 12 years and interest was to be paid annually It was further stipulated that in default of payment of interest in any year, the creditor would have the option to add the interest to the principal and to wait till the expiry of the stipulated period or to recover the principal and interest at once Nothing was paid at all by the mortgagor In a suit for sale on the mortgage it was held that time ran as soon as the first default was made From the terms of the mortgage-deed it is obvious that as soon as the first default was made a right accrued to the mortgagee to sue for the whole sum with interest On default having been made the money certainly did become due at once, the mere circumstance that the creditor had the option of not calling in the money cannot wipe out the fact that the money in fact became due—*Shib Nayal v Afeerban* 45 All 27 (F B) 20 4 I J 819 69 Ind Cas 981 A I R 1923 All 1 (dissenting from *Girdhari v Gobind* 19 A L J 456), *Sheoram v Balu Singh* 48 All 302 24 A L J 295 A I R 1916 All 493 94 Ind Cas 849

A mortgage-deed of 1890 provided payment of principal by instalments in ten years and of interest monthly and further provided that in case of default in payment of any one of the instalments of principal or interest the whole of the mortgage money would become due and be payable on demand Held that money under the bond became due within the meaning of this Article when the first default was made in 1890 and not after the expiry of ten years from the date of the bond and consequently a suit brought in 1912 was barred The learned Chief Justice remarked 'it seems to me that the money is due when it can be legally demanded and it is admitted in the present case that the money secured by this mortgage could have been legally demanded and recovered after the first default and had a suit been then brought for its recovery by sale of the mortgaged property the defendants could not have pleaded that such a suit was premature—*Gaya Din v Juman Lal* 37 All 400 (408) F B

In a mortgage bond it was stipulated that the mortgagor would repay the loan in 12 years that he would pay annually Rs 500 on account of principal and interest that if he were unable to pay the interest any year the interest might be treated as principal and that if there was any default in payment of the sum of Rs 500 per annum the mortgagee was to have power without waiting for the expiry of the stipulated period to set aside all the other stipulations embodied in the bond and to bring a suit to realise the entire principal together with interest No annual interest was paid Held that time began to run from the first default in the payment of the

annual sum of Rupees 500 and not on the expiry of the term of the mortgage bond—*Pancham v Ansar Hu ain* 43 All 596 (599) 19 A L J 597 63 Ind Cas 441 Under a mortgage executed in 1907 the principal sum borrowed was Rs 1700 and the sum was made payable in annual instalments of Rs 100 On default of payment of any one instalment the whole of the balance was to be paid at once In 1903 and 1904 the mortgagor paid only Rs 44 In 1905 the mortgagee filed a suit to recover the amount of the first two instalments and obtained a decree In 1917 the mortgagee filed a suit for recovery of the remaining 10 instalments Held that the suit was barred not only by O II, r 2 of the C P Code but also by the law of limitation, because the right of action to sue for the whole amount arose from the date of the first default (1903)—*Srinivas v Chanbasapagouda* 25 Bom L R 203 72 Ind Cas 290 A I R 1923 Bom 201

So also the principle of waiver indicated in Article 75 may be applied in determining the time when the money sued for becomes due within the meaning of Article 132 Thus a mortgage bond provided for payment of the debt in 17 instalments the first falling due in Pous 1308 B S and others in the month of Pous of each of the next 11 years ending with 1319 It was further provided that upon default in the payment of any one instalment the creditor would be entitled to recover the entire amount due without waiting for the future instalments falling due The plaintiff alleged that the first instalment was duly paid and the instalments for 1309 to 1311 were paid and accepted although the payments were made out of time and the suit was brought in 1326 B S for the subsequent instalments Held that the suit was not barred because the payment and acceptance of the overdue instalments constituted a waiver applying the principle of Article 75 and that the plaintiff was entitled to recover the subsequent instalments The penalty having been waived the parties were remitted to the same position as they would have been if no default had occurred—*Surendra Nath v Rishree Case Law* 27 C W N 893 79 Ind Cas 291 A I R 1923 Cal 139

But the Madras High Court is of opinion that in an instalment mortgage bond the cause of action accrues on the expiry of the period fixed in the mortgage bond for the repayment of the principal and not when the first default is made that Article 132 should be construed in its plain and natural sense and the words of Article 75 should not be imported into Article 132 for the purpose of determining the starting point of limitation and that the mortgagee is not bound to take advantage of the default clause but is at liberty to ignore it as it merely gives an option to recover the whole amount upon default—*Narna v Ammani* 39 Mad 981 (986) *Muthiah Chettiar v Venkatasubbarayulu* 49 Mad 403 A I R 1926 Mad 160 49 M L J 394 90 Ind Cas 1033 This view has also been taken by the Patna High Court in *Ramsekhar v Mathura* 4 Pat 820 90 Ind Cas 49 A I R 1925 Pat 557 (following 39 Mad 981) See this case cited

swung for the whole amount due on the occurrence of a default but chose instead the option of letting the interest go at compound rate it could not be said that time began to run against him from the date of the default—*Girdhari v Gobind Ram* 19 A L J 456 63 Ind Cas 25 But this case has been dissented from in the case cited below

In a mortgage bond it was stipulated that the principal was to be paid within 1 year and interest was to be paid annually It was further stipulated that in default of payment of interest in any year the creditor would have the option to add the interest to the principal and to wait till the expiry of the stipulated period or to recover the principal and interest at once Nothing was paid at all by the mortgagor In a suit for sale on the mortgage it was held that time ran as soon as the first default was made From the terms of the mortgage-deed it is obvious that as soon as the first default was made a right accrued to the mortgagee to sue for the whole sum with interest On default having been made the money certainly did become due at once the mere circumstance that the creditor had the option of not calling in the money cannot wipe out the fact that the money in fact became due—*Shib Dayal v Meherban* 45 All 27 (F B) 20 A I J 819 69 Ind Cas 981 A I R 1903 All 1 (dissenting from *Girdhari v Gobind* 13 A L J 456) *Shoran v Balu Singh* 48 All 307 24 A L J 295 A I R 1926 All 493 91 Ind Cas 849

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annual sum of Rupees 300 and not on the expiry of the term of the mortgage bond—*Panham v Ansar Hussain* 43 All 396 (599) 19 A L J 397 63 Ind Cas 441 Under a mortgage executed in 1902 the principal sum borrowed was Rs 1000 and the sum was made payable in annual instalments of Rs 100 On default of payment of any one instalment the whole of the balance was to be paid at once In 1903 and 1904 the mortgagor paid only Rs 44 In 1905 the mortgagee filed a suit to recover the amount of the first two instalments and obtained a decree In 1917 the mortgagee filed a suit for recovery of the remaining 10 instalments Held that the suit was barred not only by O II, r 2 of the C P Code but also by the law of limitation, because the right of action to sue for the whole amount arose from the date of the first default (1903)—*Shrinivas v Chanbasapagouda* 25 Bom L R 203 72 Ind Cas 290 A I R 1923 Bom 201

So also the principle of waiver indicated in Article 75 may be applied in determining the time when the money sued for becomes due within the meaning of Article 132 Thus a mortgage bond provided for payment of the debt in 12 instalments the first falling due in Pous 1308 B S and others in the month of Pous of each of the next 11 years ending with 1319 It was further provided that upon default in the payment of any one instalment the creditor would be entitled to recover the entire amount due without waiting for the future instalments falling due The plaintiff alleged that the first instalment was duly paid and the instalments for 1309 to 1311 were paid and accepted although the payments were made out of time and the suit was brought in 1326 B S for the subsequent instalments Held that the suit was not barred because the payment and acceptance of the overdue instalments constituted a waiver applying the principle of Article 75 and that the plaintiff was entitled to recover the subsequent instalments The penalty having been waived the parties were remitted to the same position as they would have been if no default had occurred—*Surendra Nath v Rishie Case Law* 27 C W N 893 79 Ind Cas 291 A I R 1923 Cal 139

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418 *ante* under Article 116 It should be noted that the view taken by the Allahabad High Court in 37 All 400 and 45 All 27 cited above (*viz* that the period of limitation runs from the date of the first default in the payment of an instalment in spite of the option given to the mortgagee to wait till the expiry of the term of the mortgage) seems to have been disapproved of by the Privy Council in the recent case of *Pancham v Ansar Hussain* 48 All 457 (P C.) 24 A L J 736 A I R 1926 P C 85 though no decided opinion has been passed by them

555 Suit against person holding adversely to the mortgagor —A suit for sale upon a mortgage brought against the mortgagor and a person claiming a right adversely to the mortgagor by twelve years possession (the adverse possession commencing at the mortgage) is governed by this Article Such a suit is not a suit for possession under Article 144 because the plaintiff cannot bring a suit for possession without bringing a suit under Art 132 The suit is in time if brought within 12 years from the date when the money becomes due The period of limitation does not run from the time when possession was taken by the adverse possessor because the adverse possession of the third party obtained after the mortgage does not affect the mortgagee's right —*Rajnaik v Narain* 36 All 567 571 (F B) distinguishing *Karan Singh v Bakar Ali* 5 All 1 (P C)

556 *Malikana* —*Malikana* is an annual recurring charge on immoveable property and must be sued for within 12 years from the time when the money sued for falls due—*Hurmuzi v Hirdaynarain* 5 Cal 921 *Jagannath v. Kharach* 10 C W N 151

In order to bring the suit within this Article the plaintiff coming into Court to claim a *malikana* allowance must claim it as a charge upon the immoveable property concerned—*Nathu v Ghansham* 41 All 259 and if he claims it as a charge upon the property the suit is governed by this Article notwithstanding that the Court refuses to pass a decree against the property—*Shanda v Phullo* 35 All 185

If however the plaintiffs do not seek to enforce it as a charge on the land for which it is payable the suit is governed by Art 175 in as much as in such a case the claim must be regarded as one arising out of a quasi contract created by law—*Kallar v Gunga* 33 Cal 998

A suit for an allowance for the maintenance of the younger member of a family charged upon the inheritance to which the eldest male member alone succeeds is within this Article—*Ahmed Hossein v Nihaluddin* 9 Cal 945

557 *Huqq* —This Article applies to suits which are brought by a *hakdar* against the person originally liable for payment of the *hak* and not to suits by one sharer in a *vatan* against another sharer or alleged sharer who has improperly received the plaintiff's share of the *hak* such a suit falls under Art 62—*Harmukhgaon v Harisukh* 7 Bom 191 (193)

A right to receive a *nankar* allowance out of the profits of a particular village is a kind of *huqq*—*Deputy Commissioner v Jagjiwan* 19 O C 49

- 133—To recover move- Twelve The date of the purchase
able property conveyed years
or bequeathed in trust,
deposited or pawned,
and afterwards bought
from the trustee, deposi-
tary or pawnee for a
valuable considera-
tion

558 This is an abridgment in favour of the purchaser for valuable consideration of the period provided in Article 145 in cases of deposit and pledge and an enactment of a special period of 12 years in the case of a purchaser from a trustee when under section 10 there would be no limitation at all in a suit against the trustee himself—*Gangneni Kondiah v Gokhspari Pedda* 33 Mad 56 (at p 58)

Unlike Article 134 the words bought from and 'purchase in Article 133 have not been changed in the Act of 1908 Hence the word purchase would not include a mortgage—*Bank of Bombay v Fazalbhoy* 24 Bom L R 513 A I R 1923 Bom 155

- 134—To recover posses- Twelve The date of the transfer
sion of immoveable years
property conveyed or
bequeathed in trust or
mortgaged and after-
wards transferred by
the trustee or mort-
gagee for a valuable
consideration

Change —The words 'purchased from in the old Act of 1877 have been changed into the words transferred by in column 1 and the word 'purchase has been changed into the word 'transfer in column 3

559 Object of this article —The underlying idea of this Article is that the creator of the trust or the original mortgagor put the trustee or mortgagee in a position to deal with the property wrongly as well as rightly and that after a limited time neither the *cestus que trust* nor the mortgagor shall be permitted to question those dealings The creator of a trust or the mortgagor should therefore be careful to whom he entrusts or mortgages

his property The utility of such an Article lies in this that it relieves the Courts of the necessity of deciding disputed questions of fact relating to transactions long past and prevents the hard swearing and chicanery to which such disputes are apt to give rise With every year that passes the chance that the Courts may be led into a wrong conclusion on a question of fact increases—*Narain Das v Hajr Abdur Rahim* 47 Cal 866 (881)

Article 134 and Sec 10 —In so far as this Article refers to trustees it must be read along with section 10 which also relates to trustees and permits a *cestus que trust* to follow trust property in the hands of trustees or their assignees (excepting assignees for valuable consideration) This exception has obvious reference to the same class of considerations as are given effect to in Article 134 in respect of suits for possession—*Ram Chandra v Shesh Mohidin* 23 Bom 614 (618) With regard to trustees the operation of this Article is controlled by sec 10—*Abhiram v Shyam Chand* 36 Cal 1003 1014 (P C) Article 134 is controlled by section 10 and refers only to cases of specific trusts See *Vidya Varuthi's* case cited below

Section 10 does not apply where the transfer by the trustee is for valuable consideration to such a case Article 134 applies—*Ramacharya v Srinivasacharya* 20 Bom L R 441 46 Ind Cas 19

Suit against whom to be brought —The suits contemplated by this Article are suits against the transferee or his representatives—*Seetha Kuti v Kunhi Pathumma* 40 Mad 1040 (1061) F B A suit for redemption of a usufructuary mortgage from the mortgagee is not a suit governed by this Article but by Article 148 It cannot have been the intention of the legislature that the mortgagee should be able to shorten the period of limitation by the mere process of making a transfer of his rights in favour of some third person Article 134 can be applicable only when the suit is being brought against the transferee of the mortgagee—*Chetty Firm v Md Kasim* 3 Rang 367 A I R 1925 Rang 377

560. *Conveyed or bequeathed in trust* —It was formerly held by the Indian Courts that a property conveyed to a *mohunt* for the benefit of the *mutt* could be said to be conveyed in trust within the meaning of this Article—*Devaswami v Vallabhaiah* 37 M L J 231 52 Ind Cas 914 If a property was a valid *debutter* absolutely dedicated to one or more *Thakurs* it fell within the description of property conveyed or bequeathed in trust and the shebait was a trustee within the meaning of Art 134—*Ramkhan v Sri Sri Hari Narayan* 2 C L J 546 But in the recent case of *Vidya Varuthi v Balusami* 44 Mad 831 843 (P C) 41 M L J 346 26 C W N 537 20 A L J 497 24 Bom L R 69 65 Ind Cas 161 A I R 1922 P C 123 the Judicial Committee have laid down that the mere fact that a property is gifted to idols and images consecrated in temples, or to religious institutions is not a ground for holding that the property is conveyed in trust that a trust in the sense in which that expression is used in English law is unknown in the Hindu system pure

and simple that the shebait or the mohant of the Idol or religious institution to which the property is dedicated holds the property only as a custodian or manager the property cannot be said to be vested in him or conveyed in trust to him similarly under the Mahomedan law, the moment a wakf is created the property vests in God Almighty the *Mutwalli* or *Sajjadanashin* is merely a manager Neither the *shebait* nor the *mutwalli* is a trustee as understood in the English system unless a specific property is conveyed to him for a specific and definite purpose and the legal ownership of the property is transferred to him Section 10 controls Article 134 and gives the clue to the meaning and applicability of that Article It clearly shows that the Article refers only to cases of *specific* trust

So also in an earlier Full Bench case of the Madras High Court it was similarly laid down that if any specific property was specifically entrusted to the head of a mutt for specific purposes he might be regarded as a trustee with regard to that property but that in the absence of any such evidence the head of the mutt was not a trustee in respect of any part of the endowment—*Kailasam v Nataraja* 33 Mad 265 (F B)

Vidya Varulhi's case has been followed in *Diwan Singh v Shamdas* 65 Ind Cas 777 A I R 1922 Lah 271 *Rama Reddi v Ranga* 49 Mad 543 *Abdur Rahim v Narayan Das* 50 Cal 329 (336) P C 28 C W N 121 71 Ind Cas 646 A I R 1923 P C 44 *Ranga v Lalchuma* 48 M L J 114 and *Mahant Ramrup v Lalchand* 1 Pat 475 (478) It should be noted that in the Privy Council case of *Ra. Parkash v Anand Das* 43 Cal 707 (P C) at p 732 the Judicial Committee had remarked that a *mohant* was not only a religious preceptor but a trustee in respect of the *mutt* But in *Vidya Varulhi's* case (cited above) it was explained that the term trustee was used in 43 Cal 707 in a general sense by way of a compendious expression to convey a general conception of the duties and obligations of the superior of a *mutt* and not in any specific sense such as that in which it is used in Article 134

561 Transferred —Art 134 of the old Act applied only to *purchases* it did not apply to a mortgage or lease See *Abhiram Goswami v Shyam Charan* 36 Cal 1003 1015 (P C) *Ishwar Shyam Chand v Ram Kana* 38 Cal 526 (P C) *Narsya v Venkataranani* 23 M L J 260 16 Ind Cas 53 where Article 134 of the Act of 1877 was held to be inapplicable to cases of grant of permanent lease Still in many cases the Article was extended to transfers by way of mortgage or lease See *Ma.aji v Fakirchand* 22 Bom 225 *Nilmoney v Jagabandhu* 23 Cal 536 *Yesu v Balakrishna* 15 Bom 583 *Behari v Madan* 20 All 482 (F B) *Hisani v Husain* 29 All 471 (478) *Ramtani v Sri Sri Hari Narayan* 2 C L J 546 *Narayan v Sri Ranachandra* 7 Bom 373 *Manavikraman v Ammu* 24 Mad 471 (F B)

But now the Legislature have used the word "transfer" in order to make

this Article applicable to all transfers for valuable consideration—sale, mortgage and lease See *Narasim Das v Haji Abdur Rahim* 47 Cal 866 (880) *Vidya Varuthi v Balusami* 44 Mad 831 (P C) at p 845 *Bagas Umarji v Nathabhai* 36 Bom 146 (150) 12 Ind Cas 737 *Chetty Firm v Md Kasim* 3 Rang 307

The suits referred to in this Article being suits for possession, the transfer contemplated by this Article is a transfer *with possession* or followed by possession as a necessary incident or ingredient of it This Article does not apply to a transfer from the trustee or mortgagee unless the transferee had possession under the transfer—*Husain v Husain* 29 All 471 (480) *Vaishali v Shimer* 47 All 803 *Charu Chandra v Nahush Chandra* 50 Cal 41 (62) *Narasim Das v Haji Abdur Rahim* 47 Cal 866 (880) *Dattagiri v Dattatraya* 27 Bom 363 (369) *Ramchandra v Sheikh Mohideen* 23 Bom 614 *Sagun v Haji* 27 Bom 500 *Chetty Firm v Md Kasim* 3 Rang 367 *Sesh Kuti v Kunhi Pathumma* 40 Mad 1040 1054 (F B) *Ran Piar v Budh Sei* 43 All 164 (167) 18 A L J 995 It should be noted that under the English law (3 & 4 Vict C 27, sec 25 which corresponds to Article 134) possession by the purchaser for valuable consideration for the statutory period of the property conveyed in breach of trust is necessary to validate the trust against the *cestui que trust*; see Lewin on Trusts 5th Edn p 633 Article 134 applies only to cases where there has been a transfer of possession and the transferee can claim the benefit of the law of limitation only when he has enjoyed 12 years possession—*Ram Chandra v Shaik Mohideen* 23 Bom 614 and the other cases cited *supra*

Where possession is taken under the transfer, but at some time *after* the date of the transfer this article may apply but time begins to run from the date when the possession is taken, and not from the date of the transfer—*Sesh Kuti v Kunhi Pathumma* 40 Mad 1040 (1054 1060) F B (per Abdur Rahim and Seshagiri Aiyar JJ) Srinivasa Ayyangar J was of opinion that in such a case Article 134 would not apply at all But Wallis C J and Coutts Trotter J held (at p 1051) that this Article applied whether possession was or was not taken at the time of transfer, and that if possession passed subsequent to the transfer, the time began to run from the date of the transfer and not from the date of possession The Calcutta High Court holds that if possession is given subsequent to the date of transfer time runs from the date of the transfer (i.e. the date of registration of the deed of transfer) and not from the date when the transferee subsequently takes possession—*Narasim Das v Haji Abdur Rahim* 47 Cal 866 882 (following the opinion of the minority in 40 Mad 1040 F B)

The Rangoon High Court holds that this Article cannot apply where possession was not given at the time of the transfer but passed subsequently to the transfer—*Chetty Firm v Md Kasim*, 3 Rang 367, A 1 R. 1915 Rang 377

If the mortgaged property is sold by the mortgagee but is repurchased by him from the person to whom he had sold it, the mortgagor can redeem the property from him within the period prescribed by Article 148. Article 134 cannot apply, because he is to be treated as a mortgagee and not as an innocent transferee with out notice—*Kalu Devda v Rupchand*, 44 Bom 848 (851), 22 Bom L R 932 58 Ind Cas 39

Since the transfer contemplated by this Article is a transfer with possession, it presupposes that the transferor mortgagee must have been in possession of the mortgaged property at the time he made the transfer. But the possession which the transferor has at the time of the transfer need not necessarily be acquired *under the mortgage* originally made in his favour. Even if the mortgage was a simple mortgage and if the mortgagee subsequently gets possession of the mortgaged property otherwise, as for example by a purchase in execution of a simple money decree obtained by another creditor, the Article will still apply if it is established that at the time the transfer was made the mortgagee was in possession, no matter under what title—*Naunikal v Skinner*, 47 All 803 23 A L J 691, A I R 1925 All 707 (per Landsay J). But *Kanhaya Lal J* is of opinion that the transferor-mortgagee must have obtained possession (from the mortgagor) *under the mortgage*, and that if the mortgagee acquired possession in some other capacity, the transfer of possession would be deemed to have been made in that capacity in which it was acquired, and such acquisition could not be attributed to the mortgage where the mortgage itself was a simple mortgage or a mortgage not entitling the mortgagee to possession by virtue of its incidents or terms.

Execution sale—Execution sale is not transfer by the trustee himself', therefore this Article does not apply to a suit against a person who purchased the property at a sale in execution of a decree against the trustee or mortgagee—*Paras Ram v Lalman* 7 Ind Cas 570 (All) *Charu Chandra v Nahush Chandra* 50 Cal 49 (63) 36 C L J 35 *Kalidas v Kanhaya*, 11 Cal 121 (P C), *Chintamani v Sarupse* 15 Cal 703 706 (so assumed); *Subbaya Pandaram v, Mahammad Mustapha* 32 M L J 85, *Kannuswami v Muthusami* 1917 M W. N 5, *Ram Piary v Budh Sain*, 43 All 164 (168) *Pandu v Vithu*, 19 Bom 140 (144), *Sobhag Chand v Bhaichand*, 6 Bom 193 (206); *Mahomed Mohsin v Mahomed Abid*, 22 O C 72, 52 Ind Cas, 159, *Sheonath v Mahipal*, 2 A L J 234. Where in execution of a money-decree, the immoveable property of the judgment-debtor, in which his real interest is that of a mortgagee, is attached and sold, the auction purchaser cannot be regarded as a purchaser within the meaning of this Article, even though the property was sold as the property of the judgment-debtor without any limitation of his interest therein—*Ahmed v Raman*, 25 Mad 99 F B (overruling *Muthu v Kambalinga* 12 Mad 316, at p 318, where this Article was held to apply equally to an auction sale as well as to a private sale)

But in the recent Privy Council case of *Subbaya Pandaram v Muhammad Mustapha*, 46 Mad 751 (757), the Judicial Committee were of opinion that this Article might apply to a case where the defendant was an auction purchaser at a sale in execution of a decree against the trustee; and their Lordships observed that "there is little difference in principle between a transfer under an adverse execution, and a sale by the trustee himself

562 'Mortgagee'—This Article must be strictly construed and can be made to apply only to cases in which there has been a transfer by a person who is actually the 'mortgagee' of the property in suit; and it is incumbent on the transferee to show that the person who sold the property to him was the mortgagee of the property. A person who purchases a property in execution of a mortgage-decree does not become the 'mortgagee' of the property. Further, in order to make this Article applicable, there must be a subsisting mortgage at the date of the transfer—*Chhoti Begam v. Ram Prasad*, 20 O C 164 39 Ind Cas 582 (584). Therefore, where a prior mortgagee by conditional sale, after having foreclosed his mortgage, transferred the right, title and interest thus acquired to a third person, it was held that the transfer was made not by a 'mortgagee' but by a person who had foreclosed the mortgage and had thus become the owner of the property, and therefore this Article could not apply—*Munna Lal v Munun Lal*, 36 All 327 (328)

The purchaser of the mortgagee's interest at an auction sale is a mortgagee for the purposes of this Article—*Kannusami v Muthusami*, 1917 M. W. N 5 38 Ind Cas 194, *Ghasi Ram v Krishna*, 13 A L J 877, 30 Ind Cas 564.

563. Nature of the interest transferred—The question to be determined under this Article is as to what the transferee intended to purchase and what the transferor intended to transfer. The real test would be, did he (the transferee) ask for and obtain an absolute right in the property and believe himself that he was having an absolute interest in it?—*Muthiya v Kanthappa*, 34 M L J 431, 45 Ind Cas 975. The question whether the transferee from a mortgagee took an absolute interest or only a mortgage interest is a question of intention—*Ibid*, *Lakshmana v. Sankara*, 51 M. L. J 451, A. I. R. 1916 Mad 311.

In order to make this Article applicable, the transferee should take a transfer of an absolute and not of a restricted title. If the transferee does not profess or intend to take the transfer of an absolute interest or anything more than the qualified interest which the transferor is competent to alienate, there is no occasion for this Article to apply—*Ramkani v. Sri Sri Hari Narain*, 2 C. L. J. 546. This Article is intended to protect a transferee who had reasonable grounds for believing that his transferor had the power to convey and did convey an absolute interest. This Article applies where the transferee is a person who takes the transfer

under the representation made to him and in the belief that it is an absolute title which he is taking—*Husain v Husain*, 29 All 471; *Ram Prart v Budh Sein*, 43 All 164 (167) *Taluqdari Settlement Officer v Akunji Abhram*, 24 Bom L R 762 *Manavikraman v Ammu* 24 Mad 471 (F B), *Muthu v Kambalinga* 12 Mad 316 (318) *Keshav v Gafurkhan* 46 Bom 903 (906) *Pandu v Vithu* 19 Bom 140 (144); *Radhanath v Gisborne*, 14 M I A 1, *Mahabir v Sheoraj* 9 O C 373; *Dalal v Gur Prasad* 12 O C 84 *Bhagwan v Bhagwan* 9 All 97 (102), *Azim v Mahmud*, 124 P R 1883 The transfers contemplated by this Article are transfers for value in excess of the limited powers of the trustee or the mortgagee—*Narain Das v Haji Abdur Rahim*, 47 Cal 866 (880) Thus, where the defendant's vendor purported to transfer the full ownership when in point of law he had only a mortgagee-right to transfer, the case was governed by Article 134—*Rego v Abu Beari*, 21 Mad 131, *Mirza yar Ali Beg v Danish Ali*, 2 O L J 483, 32 Ind Cas 314

A purchaser for valuable consideration from a mortgagee by conditional sale, who sold the property, as though he were the ostensible owner of it, comes under this Article—*Vishnu v Balaji* 12 Bom 352 (358) Where the trustee of a muth property granted a permanent lease of the property, which he was not competent to do, held that the lessor intended to grant, and the lessee intended to acquire, an interest greater than the transferor was competent to alienate, and all the requirements of Article 134 were complied with—*Baluswami v Venkataswamy*, 40 Mad. 745 (751) This Article protects a person who happening to purchase from a mortgagee had reasonable grounds for believing and did believe that his vendor had the power to convey and was conveying to him an absolute interest and not merely the interest of a mortgagee—*Bhagwan Sahai v Bhagwan Din*, 9 All 97 A mortgagee who took a mortgage from a person who was merely a mortgagee of the lands but who mortgaged them as if he were the complete owner, is entitled to the benefit of this Article—*Manavikraman v Ammu*, 24 Mad 471 (483) F. B *Husain v Husain*, 29 All 471 (479), *Bagas Umarji v Nathabhai*, 36 Bom 146

So also, where the purchaser at the time of the purchase believes that his transferor is an absolute owner of the property transferred, but finds later on that his transferor was only a mortgagee and not the owner of the property, he is none the less a transferee of an absolute interest, and is entitled to the benefit of this Article—*Keshav Raghunath v Gofurkahn*, 46 Bom 903 (907), 24 Bom L R 319 67 Ind Cas 308, A I R 1922 Bom 234

But this Article does not apply where the mortgagee transfers his interest as such i e where the defendants (transferees) claim a transfer of the mortgagee interest and not of the entire property in the land—*Savali v Genu*, 18 Bom 387, *Gharu Chandra v Nahush Chandra*, 50 Cal 49

the annual rent being the consideration—*Rameshwar v Sri Sri Jiu Thakur*, 43 Cal 34 (43). *Baluswamy v Venkataswamy* 40 Mad 745 (749). *Zafar Ali v Asken Chand* 99 P R 1919. *Ram Kanai v Sri Sri Hari Narain* 2 C L J 546. *Rama Reddi v Ranga Dasan* 49 Mad 543. But the Privy Council has laid down that a permanent lease of a trust property is not a transfer for valuable consideration—*Jadva Paruthi v Balusami* 44 Mad 831 854 (P C.) followed in *Lakshminarayana v Rajamma* 21 L W 256 A I R 1925 Mad 776. A gift of a portion of the temple property to the defendants in consideration of their performing some recurrent religious services at the temple is a transfer for a valuable consideration within the meaning of this Article—*Ramacharya v Shrinivasacharya* 20 Bom L R 441 46 Ind Cas 19 (20).

Good faith—Notice—In order to make this Article applicable it is not necessary that the purchaser should show that he purchased *bona fide*, in the sense of being without notice of the restricted nature of the transferor's title—*Pandu v Isthu* 19 Bom 140 (144). *Yesu Ramya v Balakrishna*, 15 Bom 583 (585). *Hargian v Baldeo* 12 F R 1008 (F B). *Venku v. Ramachandrayya* 49 M L J 634. *Hannu Gami v Muthuswami*, 1917 M W N 5. If he is a purchaser for value, and takes a transfer of an absolute interest that is sufficient to bring the case under this Article. The fact that he knew that his vendor was selling more than he was competent to transfer does not take the case out of this Article. The material point is not what the transferee knows but what he takes. Knowledge of the limited nature of the transferor's title will not disentitle the transferee from taking advantage of this Article though it may be an important piece of evidence in determining what interest the transferee took—*Baluswami v. Venkataswami*, 40 Mad 715 (750). The fact that the transferee had notice that her vendor was selling to her a *debtor's* property, would not preclude her from being regarded as a purchaser for valuable consideration—*Shama Charan v Abhiram Gossami*, 33 Cal 511. This Article refers to purchasers from a trustee for valuable consideration and is not restricted to purchasers in good faith. When the Limitation Act of 1871 was replaced by the Act of 1877, the Legislature omitted the words 'in good faith' and the conclusion is irresistible that this alteration was made designedly with a view to protect a purchaser for valuable consideration whether such purchaser had or had not notice of the trust or mortgage at the time of transfer—*Ramkanai v Sri Sri Hari Narain* 2 C L J 546. *Subbaya v Mahammad Musthafa*, 32 M L J 85. *Keshav v Gajurkhan* 46 Bom 903 (907). *Venku Shethkatti v Ramachandrayya*, 49 M L J 634 A I R 1926 Mad, 81. *Narain Das v Haji Abdur Rahim*, 47 Cal 866 (878). *Dal Singh v Gur Prasad*, 12 O C 84, 2 Ind Cas 250. The mortgagee may be dishonest; the purchaser may not make any enquiry as to his vendor's title, the mortgagor may be ignorant of the sale of his property by the mortgagee; but these facts no longer affect the rights of the purchaser who has given valua-

36 C L J 35 *Mirsa Yar Ali Beg v Damsli Ali* (supra) Thus where the mortgagee transfers his mortgagee rights as such the transferee stands in no better position than the transferor consequently the mortgagor has sixty years under Art 148 within which to bring a suit for redemption against the person who purchases only the mortgagee rights from the mortgagee—*Drigpal v Kallu* 37 All 660 (661) *Muthu v Kambalinga* 12 Mad 316 (318) *Bhagwan Sahai v Bhagwan Din* 9 All 97 (102) *Azin v Mah mud* 124 P R 1883 *Ram Piar v Budh Sen* 43 All 164 (167) *Vishvaiah v Tukaram* 27 Bom L R 661 *Tairamiya v Shibelisaheb* 44 Bom 614 (618) *Gomli Misra v Deota D n* 6 O C 197 A I R 1924 Oudh 44 *Ma Myat Gyi v Ma Ma Nin* 2 Rang 561 Where both the transferor and the transferee knew that the transferor was unable to confer a higher right than that of a submortgagee on the transferee and neither the transferor nor the transferee honestly believed that the full ownership was being passed the mere insertion of some words in the document which might be construed as if they were the words of a person possessing such right as would enable him to pass a title of full owner to his transferee while the consideration was the consideration of a mortgage and not of sale did not confer full ownership on the transferee Under these circumstances it cannot be maintained that there was an *animus* to pass anything more than an assignment of the mortgagee rights which were vested in the transferor—*Lakshmana v Sankarapandiam* 51 M L J 451 93 Ind Cas 276 A I R 1926 Mad 311

In order to get the benefit of this Article the onus lies on the transferee to show that he is the transferee of an *absolute* title and not merely of the mortgagee's rights in the property—*Vythilinga v Kuthisavallah* 29 Mad 501 *Veerabadra v Terrappa* 15 Ind Cas 609 (610) If on the other hand the title adduced by the vendor and the deed of transfer to the purchaser are consistent with an intention to transfer an absolute interest the burden will be upon the plaintiff to show that the circumstances of the transfer negative such an intention—*Muthaya v Kanthappa* 34 M L J 431 45 Ind Cas 975

564 Transfer for valuable consideration —The expression transferred for a valuable consideration in this Article is in contra-distinction to a mere volunteer—*Ramkanas v Sri Sri Hari Narayan* 2 C L J 546 *Maluji v Fakirchand* 22 Bom 225 (228) If the transferee is not a transferee for valuable consideration a suit against him is not barred by any length of time by virtue of sec 10—*Chellikula v Sriranga* 26 M L J 537

A valuable consideration in the sense of the law may consist either in some right interest profit or benefit accruing to the one party or some forbearance detriment loss or responsibility given suffered or under taken by the other—*Currie v Misa* (1875) L R 10 Exch 153 (162)

A grant of a permanent lease is a transfer for a valuable consideration

the annual rent being the consideration—*Rameshwar v Sri Sri Jiu Thakur*, 43 Cal 34 (43), *Baluswamy v Venkataswamy*, 40 Mad 745 (749), *Zafar Ali v Kishen Chand*, 99 P R 1919 *Ram Kanai v Sri Sri Hari Narain* 2 C L J 546 *Rama Reddi v Ranga Dasan* 49 Mad 543. But the Privy Council has laid down that a permanent lease of a trust property is not a transfer for valuable consideration—*Vidya Varuthi v Balusami*, 44 Mad 831, 851 (P C), followed in *Lakshminarayana v. Rajamma*, 21 L. W 256, A I R 1925 Mad 796. A gift of a portion of the temple property to the defendants in consideration of their performing some recurrent religious services at the temple, is a transfer for a valuable consideration within the meaning of this Article—*Ramacharya v Shrinivasa-harya*, 20 Bom L R 441 46 Ind Cas 19 (20).

Good faith—Notice—In order to make this Article applicable it is not necessary that the purchaser should show that he purchased *bona fide*, in the sense of being without notice of the restricted nature of the transferor's title—*Pandu v Vistku*, 19 Bom 140 (144) *Yesu Ramji v Balakrishna*, 15 Bom 583 (585), *Hargian v Baldeo* 127 P R 1908 (F B), *Venku v. Ramachandrayya*, 49 M L J 634 *Kannuswami v Mulhuswami*, 1917 M W N 5. If he is a purchaser for value, and takes a transfer of an absolute interest, that is sufficient to bring the case under this Article. The fact that he knew that his vendor was selling more than he was competent to transfer does not take the case out of this Article. The material point is not what the transferee knows but what he takes. Knowledge of the limited nature of the transferor's title will not disentitle the transferee from taking advantage of this Article though it may be an important piece of evidence in determining what interest the transferee took—*Baluswami v. Venkataswami*, 40 Mad 745 (750). The fact that the transferee had notice that her vendor was selling to her a *debutter* property would not preclude her from being regarded as a purchaser for valuable consideration—*Shama Charan v Abhiram Goswami*, 33 Cal 511. This Article refers to purchasers from a trustee for valuable consideration and is not restricted to purchasers in good faith. When the Limitation Act of 1871 was replaced by the Act of 1877, the Legislature omitted the words 'in good faith' and the conclusion is irresistible that this alteration was made designedly with a view to protect a purchaser for valuable consideration whether such purchaser had or had not notice of the trust or mortgage at the time of transfer—*Ramkanai v Sri Sri Hari Narain* 2 C L J 546 *Subbaya v Mahammad Muskhapa*, 32 M L J 85, *Keshav v Gafurkhan*, 46 Bom 903 (907), *Venku Shethshi v Ramachandrayya* 49 M L J 634, A I R 1926 Mad. 81, *Narain Das v Haji Abdur Rahim*, 47 Cal 866 (878), *Dal Singh v. Gur Prasad*, 12 O C 84, 2 Ind Cas 250. The mortgagee may be dishonest; the purchaser may not make any enquiry as to his vendor's title, the mortgagor may be ignorant of the sale of his property by the mortgagee; these facts no longer affect the rights of the purchaser who has given

bie consideration Article 134 of the Limitation Act of 1871 required good faith on his part That condition was however removed by the Act of 1877 and is not re imposed by the Act of 1908—*Keshav Raghunath v Gafurkhan*, 46 Bom 903 (908)

But the Allahabad High Court dissents from this view and holds that the omission of the words in good faith makes no difference in the law from what it stood under the Act of 1871 that the omission of those words from the Acts of 1871 and 1908 is merely due to the fact that the words were considered not altogether appropriate and that their retention would throw the onus on the transferee of proving that he had no knowledge of his vendor's title which would be in many cases a hardship upon him after the lapse of many years and that a suit against a transferee who purchases with knowledge that his vendor's title is merely that of a mortgagee does not fall under this Article—*Drigpal v Kallu* 37 All 660 (661 662) *Bhagwan Sakai v Bhagwan Din* 9 All 97 (101), *Abdulla v Shamsul* 18 A L J 969, 38 Ind Cas 833 (835) *Ghass Ram v Krishna*, 13 A L J 877 30 Ind Cas 564 (565) The Bombay High Court has recently held that Article 134 does not apply to a suit by a mortgagor to recover possession from his mortgagee's transferee who had even constructive notice of the mortgage—*Vishwamath v Tukaram* 27 Bom L R 661 A I R 1923 Bom 417, 89 Ind Cas 189 (distinguishing *Keshav v Gafurkhan* 46 Bom 903 on the ground that in that case the purchaser from the mortgagee became aware of the real title of the mortgagee several months after his purchase and not at the time of his purchase)

The Oudh Chief Court is of the same opinion as the Allahabad High Court, viz., that a person who purchases from a mortgagee with full knowledge that the latter has only a mortgagee right cannot claim the benefit of this Article even though the sale may ostensibly be one of full proprietary right because where the transferor and transferee combine to represent what is really a mortgagee right as a proprietary right, they are really combining to practise a fraud upon the true owner and no party is entitled to take advantage of his own fraud—*Bijay Partab v Raghuraj*, 25 O C 115 A I R 1922 Oudh 7, 67 Ind Cas 572, *Mahbub Ali v MId Husain*, 23 O C 125, *Gomti Misra v Deota Din*, 26 O C 197, A I R 1924 Oudh 44 But mere constructive notice without actual knowledge (i.e., the mere fact that by the exercise of due diligence the purchaser might have discovered that his transferor was only a mortgagee) is not sufficient to deprive the purchaser of the benefit of this Article It must be clearly proved that he had actual knowledge of the true state of his vendor's title—*Bijoy Partab v Raghuraj* (supra) and the onus of proving it is on the plaintiff—Ibid

But a transfer by a trustee does not stand on the same footing as a transfer by a mortgagor Where the transfer is made by a trustee for a valuable

consideration the question of good faith becomes practically immaterial for if the transferee had acquired the property from a trustee in good faith and for a valuable consideration without having a notice of the trust he acquires an immediate title to the property under sec 64 of the Indian Trusts Act but if he has not acted in good faith and has paid valuable consideration he acquires a good title after the lapse of the period (12 years) necessary for extinguishing the right of the beneficiary to follow the trust property in his hands—*Gomti Misra v Deota Din* 26 O C 197 A I R 1914 Oudh 44 77 Ind Cas 737

565 Suits under this Article —A suit by the succeeding trustee to set aside a transfer made by the preceding trustee and to recover the trust property is governed by this Article or Article 144 and would be barred if brought more than twelve years after the date of the alienation—*Dattagiri v Dattatraya* 27 Bom 363 *Sagun Balhrishna v Haji Hussain* 27 Bom 500 *Nulmoney v Jagabandhu* 23 Cal 536 *Bhari v Muhammad* 22 All 482 (F B) *Narayan v Sri Ram Chandra* 27 Bom 373 *Manmatho v Annada* 27 C. L. J 201 *Narain Das v Haji Abdur Rahim* 47 Cal 866, *Ishwar Sham Chand v Ram Kanai* 38 Cal 526 (P C) The suit falls under Article 134 but in some of these cases (under the Act of 1877) Article 144 was applied on the ground that a transfer by way of mortgage or lease did not come under Article 134 But the starting point of limitation was held to be the same in all the cases viz the date of transfer

It is competent under sec 92 of the C P Code for the disciples of a *mull* as persons representing the beneficiaries of the *mull* or as persons interested in the *mull* to sue for the cancellation of an improper alienation made by the *mohunt* of the *mull* property and for its restoration to the *mohunt* even though he is one of the defendants To such a suit either this Article or Art 144 applies—*Chidambaranatha v Nallasiva* 41 Mad 104 (129) 33 M L J 357 42 Ind Cas 366

Where trust property was sold as the personal property of the trustee at an execution sale and the auction purchaser was in possession for more than 12 years a suit by the succeeding trustee to recover the trust property from the purchaser is barred under this Article or Article 144—*Subbaya Pandaram v Muhammad Mustapha* 46 Mad 751 756 (P C)

A suit for the dismissal of a trustee and for the recovery of trust property from the hands of a third party to whom the same has been improperly alienated with a prayer that the property may be delivered to the possession and custody of the person who may be appointed trustee is a suit governed by this Article—*Sajedur Raja v Gourmohan* 24 Cal 418 (429)

A suit for joint possession of trust property brought by a trustee against a co trustee and an alienee of the trust property from the latter is governed by this Article or Art 144—*Shadi v Abdur Rahman* 1 Lah 66 (68)

A Hindu reversioner instituted a suit in 1914 to recover possession of certain lands which had been usufructually mortgaged by the last male

owner in 1866 and had been sold for consideration by the mortgagee in 1900 after the death of the last male owner and during the lifetime of his daughter who had inherited the estate and died in 1906 *Held* that the suit was governed by Article 134 and not 141 and was barred Article 141 did not apply as the mortgage had been created not by the female owner (daughter) herself but by the last male owner—*Sesha Naidu v Periasami* 44 Mad 951 (1958) 41 M L J 163 68 Ind Cas 734

566 Limitation.—Where the transferee takes possession not at the date of transfer but at some time after, limitation runs according to the Calcutta High Court from the date of transfer and not from the time when the transferee takes possession of the property—*Narain Das v Haji Abdur* 47 Cal 866 (1882) But according to the Madras High Court time runs not from the date of transfer but from the date when the transferee subsequently takes possession under the transfer—*Seetha Kutti v Kunhi Pathumma* 40 Mad 1040 1054 (F B) See notes at p 502 *ante*

In a suit by a succeeding trustee to recover possession of trust property alienated by a preceding trustee or *shebait* limitation will run from the date of alienation by the preceding trustee or *shebait* and not from the date of the plaintiff's appointment as the succeeding trustee or *shebait*—*Ramkhanal v Sri Sri Hari Narain* 2 C L J 546 *Monmalko v Annada* 27 C L J 201 44 Ind Cas 567 *Shadi v Abdur Rahman* 1 Lah 66 (68) *Devanakamani v Valiammal* 37 M L J 231 57 Ind Cas 914 *Purna Chandra v Asukar* 9 Ind Cas 133 (134) *Vilmony v Jagabandhu* 23 Cal 536 (545) *Har Gian v Balica* 127 P R 1908 (F B) *Sajedur Raja v Gour Mohan* 24 Cal 418 (409) *Sagun Balakrishna v Haji Hussein* 27 Bom 500 *Pandurang v Dnyanu* 36 Bom 135 12 Ind Cas 926 The reason is that there is but one cause of action arising upon the alienation and it is not renewed by each successive appointment of a new trustee The representation of an idol by a *shebait* is a continuing representation and limitation runs against the idol continuously and not against each *shebait* individually as and when he succeeds to the office the *shebait*s not being holders of successive life estates in the management of the property of the endowment—*Monmalko v Annada* 27 C L J 201 *Madhusudhan v Radhika Prasad* 17 C W N 873 16 Ind Cas 927 (928)

(But see *Bashashar v Natha Singh* 30 P R 1908 where it has been held that time runs not from the date of the alienation by the preceding *mohant* but from the date of the alienor's death when the successor becomes entitled to succeed to the office This was a case of mortgage by the *mohant* and consequently Art 134 of the Act of 1877 not being applicable the limitation of Article 144 was applied)

But where a *permanent lease* is granted by the trustee (which he has no power to do, because he can dispose of the property by a lease to endure only during the period of his life) the grant is good only to the extent of his own life interest During his life the possession of the property by the lessee

is not adverse and upon his death the succeeding trustee would be at liberty to institute proceedings to recover the estate and the statute (Art 144) would only run against him as from the time when he assumed the office—*Subbasa Pandaram v. Muhammad Mustapha* 46 Mad 751 756 (P C) *Akhiram v. Niyama Charan* 40 Cal 1003 1015, 1 L J *Muthusamiyer v. Sree Sreemethan* 43 38 Mad 156 (10) *Lila Paruthi v. Ba'nuswami* 44 Mad 831 835 (P C) *Mahomed Canazizhi* 23 Mad 277 (280) *Govinda Rao v. Chinna hura* 49 M L J 640 A I R 1926 Mad 591

567 Effect of bar of limitation.—If a mortgagee in possession claiming to be absolutely entitled to the property mortgages it with possession in 1894 to another person (defendant no 5) and the original mortgagor (plaintiff) does not bring a suit under this Article to recover the possession of the property from the defendant no 5 within 12 years from 1894 the defendant no 5 will acquire the full interest of a mortgagee and the plaintiff (original mortgagor) will not be entitled to redeem the property from the original mortgagee without redeeming the defendant no 5—*Bagai Umari v. Vathabhai* 36 Bom 146 12 Ind Cas 737 *Taluydar Self ement Officer v. Akaji* 24 Bom L R 762 A I R 1922 Bom 350 In such a case Art 134 coupled with section 28 having given particular legal validity to the subsequent mortgage (i.e. the mortgage by the mortgagee) the original mortgagor would be barred by Art 134 from redeeming the property from the original mortgagee alone by disregarding the subsequent mortgage. The subsequent mortgagee has a right to hold it until the debt is paid—*Mahaji v. Fokirchand* 22 Bom 225 (229)

When a mortgagee sells the mortgaged property ostensibly as owner and for valuable consideration, and no suit is brought under this Article by the mortgagor within 12 years the right of the purchaser becomes unassailable—*Keshao Raghunath v. Gafurkhan* 46 Bom 903 (908) *Krishnaji v. Sadanand* 26 Bom L R 341 A I R 1924 Bom 417 80 Ind Cas 763

135—Suit instituted in a Court not established by Royal Charter by a mortgagee for possession of immoveable property mortgaged	Twelve years	When the mortgagor's right to possession determines
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568 Scope.—This Article is not confined to suits against the mortgagor himself, but applies to a suit against the mortgagor as well as against a stranger. Article 146 which provides for suits for possession by mortgagees in High Courts contains the words "from the mortgagor but these words are omitted from Article 135. Consequently Article 135 applies to a suit against a person other than the mortgagor—*Vijaypur v. Sonamma*,

the mortgage his right to possession determined on the very date of the mortgage and the mortgagee was at once entitled to possession the mortgagee must sue for possession under this Article within 12 years from that date and the fact that the possession of the mortgaged property was taken in the meantime by a prior mortgagee did not stop limitation from running (sec 9) or entitle the plaintiff to deduct the period during which the prior mortgagee was in possession—*Hukum Chand v Shahab Din* 4 Lah 90 A I R 1924 Lah 40 71 Ind Cas 495

Under this Article time begins to run from the day when the mortgagor's right to possession determines and this clearly means when his right to possession according to the terms of the mortgage-deed determines. The cause of action in a suit contemplated by this Article is the failure of the mortgagee to get possession when he was first entitled to get possession—*Anjuman v Hisamal* 9 N L R 179 22 Ind Cas 65

If the mortgage-deed provides that on default in payment of the mortgage money within the date fixed in the deed the mortgagee would be entitled to possession the period of limitation for a suit by the mortgagee for possession runs from the date of default because the mortgagor's right to possession ceases from that date—*Kanhaya v Mohru* 96 P R 1890 *Modun Mohan v Ashad Ali* 10 Cal 68 (72) *Shurnomoyee v Srinath* 12 Cal 614 (620)

Where under the terms of a mortgage-deed the mortgage money was made payable by certain stated instalments and it was stipulated that on the mortgagor's failure to pay six such instalments the mortgagee was to be placed in possession of the properties held that limitation for the mortgagee's suit for possession ran from the date of the mortgagor's failure to pay six instalments—*Bishan Lal v Khushali* 91 P R 1908 4 Ind Cas 921

Before the Transfer of Property Act a mortgagee by conditional sale was entitled to possession after the year of grace where the proceedings were taken under Reg XVII of 1806. If the mortgagee brought the suit for possession after twelve years from the expiry of the period of grace it was held to be barred—*Srinath v Khetter* 16 Cal 693 700 (P C) *Modun Mohun v Ashad Ali* 10 Cal 68 (72). Where a mortgage by conditional sale expressly provided that if default should be made in the payment of the mortgage money within the stipulated period the mortgagee should be entitled to possession without any foreclosure proceedings and the mortgagor having failed to pay within the date fixed in the mortgage-deed the mortgagee took foreclosure proceedings more than 12 years after the date of default and then after the expiry of the year of grace he brought a suit for possession held that the suit was barred because the period of limitation ran not from the expiry of the period of grace but from the date of default in payment of the mortgage money that being the date when the mortgagee was entitled to possession under the express stipulation in the mortgage

deed—*Denonath v. Nursingh Pershad*, 22 W R 90, 14 B L R 87; *Nand Lal v Gooliar*, 94 P R 1912 15 Ind Cas 275, *Moman v Ishra Pershad* 35 P R 1899 It should be observed that in these cases the mortgagee took foreclosure proceedings after the period of 12 years had run out (under Article 135) from the date of default and hence the foreclosure proceedings did not give the mortgagee a fresh cause of action. But where the mortgage deed provided that on default of payment of mortgage money within the time fixed the mortgagee would be entitled to possession but the mortgagee instead of suing for possession upon default took foreclosure proceedings within 12 years from the date of default, and then after the expiration of the year of grace he brought a suit for possession held that as the mortgagee completed the foreclosure proceedings before the period of limitation for the suit under Article 135 had run out he acquired a title as absolute owner, and he had, after the expiry of the period of grace a fresh period of 12 years within which to bring a suit for possession and this suit was governed by Article 144 (and not Art 135) because he was suing not as mortgagee but as absolute owner—*Ghinaram v Ram Monarath* 7 C L R 580, *Ratan Das v Guran*, 79 P R 1918 45 Ind Cas 563 *Burmamoyes v Dinobundhoo*, 6 Cal 564 *Tekchand v Soheli Singh* 65 P R 1906, *Bhandari v Jasodhan*, 90 P R, 1895 (F B)

A mortgagee in possession can take out foreclosure proceedings at any time during the subsistence of his mortgage provided it permits of foreclosure, consequently, where a usufructuary mortgage is executed in 1881 and the mortgagee has remained in possession ever since the execution of the deed and then he issues the foreclosure notice in April 1899 under Reg XVII of 1806 and institutes a suit in 1902 for a declaration that owing to the mortgage being foreclosed he is entitled to hold the land as absolute owner, the suit is not barred (although brought more than 12 years after the date fixed for redemption) Article 135 does not apply because the suit is not one for possession but one for declaration—*Nagar v Sandagar*, 57 P R 1908

A mortgage by conditional sale was made in 1866 for a period of six years and provided that if after six years anything remained due to the mortgagees, they might forthwith enter into possession and realise the principal and interest. There was a provision amongst others that the property would not be transferred by the mortgagor so long as any principal or interest remained due, and that if it was transferred the mortgagees without waiting for the expiry of the six years might bring a suit for recovery of the principal and interest and might also get possession "by completion of the sale." Nothing was paid by the mortgagor and in 1867 part of the mortgaged property was transferred. Proceedings under section 8 of Regulation XVII of 1806 were not taken by the mortgagees. In 1910, the representatives of the mortgagees instituted a suit for foreclosure. It was held that the cause of action accrued in 1867, and the suit was

barred—*Ban gopal v Sheo Ram* 38 All 97 (102) 14 A L J 1 32 Ind Cas 95

Where the mortgaged property is situated on the bank of a river and is liable to submersion but was out of water at the date of the mortgage a suit by the mortgagee for possession of the mortgaged property must be brought within 12 years from the date of the mortgage and the fact that the land became subsequently submerged would not stop the period of limitation and revive it when the land afterwards emerged out of water—*Barlet v Relu Mal* 26 P L R 7 9 92 Ind Cas 178 A 1 R 1925 Lah 6 7

In case of a usufructuary mortgage the mortgagor's right to possession determines on the date of the mortgage. If at the time the mortgagor makes the usufructuary mortgage the property is in the hands of a prior mortgagee still Article 135 applies to a suit for possession by the usufructuary mortgagee and time runs from the date of his mortgage. Under Article 135 it is immaterial whether the possession of the property mortgaged is held at the time of the mortgage by the mortgagor or by a prior mortgagee. As between the mortgagor and the mortgagee the mortgagor's right to possession ceases when he makes a fresh mortgage—*Husains v Rams Charan* 18 O C 280 32 Ind Cas 341. But the Punjab Chief Court dissents from this ruling and holds that if a property which is already in the possession of a prior mortgagee is again mortgaged with possession a suit by the subsequent mortgagee for possession is not maintainable until the prior mortgage is redeemed. Article 135 distinctly contemplates that the possession is with the mortgagor limitation under Article 135 for a suit by the puisne mortgagee does not begin to run until the redemption of the first mortgage and he is entitled to bring his suit for possession within 12 years from the date of redemption—*Budla v Mul Raj* 48 Ind. Cas 916 (Pun) dissenting from 18 O C 280

136—By a purchaser at Twelve When the vendor is a private sale for years first entitled to possession of immovable property sold session when the vendor was out of possession at the date of the sale

572 Scope —Article 136 applies to suits brought by purchasers against third persons in possession of the land—*Lakshman v Bissansingh* 15 Bom 261 (264) *Gajadhar v Ram Lakhan* 5 Ind Cas 273 (All)

Where a vendor was at the time of sale out of possession and subsequently recovered possession a suit by the vendee to recover possession from the vendor would be governed by Art 144 and not by this Article

and time runs from the date of the vendor's recovery of possession and not from the date when the vendor was originally dispossessed—*Ram Prasad v Lakhi Narain* 12 Cal 197 (199) *Syed Nyamtula v Nana* 13 Bom 424 (428) In *Sheo Prasad v Uday* 2 All 718 it was held that either Article 136 or Art 144 might apply

Thus Article applies when the vendor is out of possession at the date of sale if the vendor is in possession at the date of sale such possession is adverse to the purchaser and a suit by the latter to recover possession is governed by Article 144 and must be brought within 12 years from the date of sale—*Syed Nyamtula v Nana* 13 Bom 424 (428)

This Article cannot apply where the vendor is not entitled to possession, i.e., where the vendor's right to possession has become time barred Thus, where an order under sec 335 C P Code 1882 has been passed against the vendor and he has not sued for possession of the property within the period of one year prescribed by Article 11A and then he sells the property to the plaintiff a suit by the plaintiff to recover the property does not fall under Article 136 This Article applies to cases in which a time has arrived when the plaintiff can assert that his vendor has become entitled to possession and that assertion it is impossible for the plaintiff to make as long as an order under sec 335 C P Code is in operation declaring that the vendor is not entitled to possession In such a case the plaintiff cannot evade the obstacle of Article 11A by having recourse to Article 136 as if that obstacle did not exist—*Mahadev v Babu* 26 Bom 730 (735)

573 Vendor—The expression vendor means a vendor other than the auction purchaser mentioned in Art 138 In other words this Article does not apply to a suit brought by a purchaser from an auction purchaser who was out of possession at the date of sale the property being in the possession of the judgment-debtor To such a suit Article 138 would apply, because the word auction purchaser in that Article includes a purchaser from an auction purchaser—*Sati Prasad v Jogesh* 31 Cal 631, 684 F B (over ruling *Mohima v Nabin* 23 Cal 49)

Where there have been transfers by successive vendors who have all been out of possession this Article may well be construed so as to include in the term 'vendor' the first of the series of vendors who was entitled to sue for possession—*Abbas v Masabdi* 24 Ind Cas 216 (Cal)

Out of possession—The expression 'out of possession' implies that some person is in possession adversely to the vendor—some person holding in a character incompatible with the idea that the ownership remained vested in the vendor—*Chintamani v Hriday*, 29 C L J 241 *Garpat v Ganpat* 2 N L R 321 and the word 'possession' contemplates not only actual possession but also includes such possession as a member of a joint family is presumed to have in the family property until excluded there from—*Venkayya v Rama Krishnamma* 9 M L T 397 9 Ind Cas 495 Therefore, where the vendor sold to the plaintiff a share in a tank which

she held jointly with other co sharers the mere fact that on some occasions the co-sharers caught fish in the tank and appropriated the same entirely for themselves does not prove that the vendor was out of possession It is incumbent on the co sharers to establish that they had set up a hostile title and excluded her from possession—*Chintamani v Hriday* 29 C L J 241 51 Ind Cas 123 If a property belonging to two tenants in common is in the possession of one of them it does not follow that he is holding adversely to the other tenant in common and that the latter is out of possession ' There must be evidence of ouster that is to say evidence of denial by the tenant in possession of the right of the other tenant to a share in the profits of the property It does not follow therefore that as soon as a receipt of all the profits by one tenant in common commences the time is running adversely against the other tenant It is only after continuous enjoyment by one tenant in common that a presumption may arise that he has denied the right of the other tenant in common to enjoy together with him the property—*Shivalingappa v Satyava* 23 Bom L R 967 64 Ind Cas 552

574 Starting point of limitation —A suit by a reversioner for possession after the death of a Hindu widow falls under Article 141 but a suit by an assignee from the reversioner who was out of possession at the date of the sale falls under this Article and not under Art 141 and must be brought within twelve years from the date of the death of the widow that being the date when the reversioner was first entitled to possession (under the provision of Article 136)—*Gadadhar v Harekrishna* 8 C W N 535 (538)

When a decree is passed declaring a person's right to the property he is said to be entitled to possession on the date of the decree and the period of limitation runs from that date—*Sheo Prasad v Udoi Singh* 2 All 718

In a suit by the purchaser of a share in joint family property of which the vendor was not in possession the *onus* lies on the purchaser to shew that his vendor's exclusion from possession was within twelve years before the institution of the suit—*Ram Lakhi v Durga* 11 Cal 680 (683)

The words in the 3rd column (when the vendor is *first* entitled to possession) relate to the *beginning of the dispossession* referred to in the first column and the meaning of this Article is that if supposing no sale had taken place the vendor's title would have been alive at the time the vendee's suit is brought such suit is not barred but if on the other hand the vendor had been out of possession for more than 12 years at the date of the vendee's suit such a suit would be too late consequently in the case of a suit contemplated by this Article when the purchaser succeeds in showing that the exclusion of the vendor from possession took place within 12 years of the institution of his suit he succeeds in showing that his suit is within time Thus if a person (vendor) succeeds to property on his father's death remains in possession thereof for 20 years is then ousted

by a trespasser and 2 years after this sells his rights it cannot be contended in a suit brought by the vendee against the trespasser that in as much as the plaintiff's vendor was first entitled to possession on his father's death 22 years before the suit is out of time. The period of limitation ran from the time when the dispossession began i.e., two years before, when the vendor was first entitled to recover possession from the trespasser—*Parlap Chand v Sayida* 23 All 442 (445)

Onus of proof—It has been held in two cases that where the vendor was out of possession at the date of sale, and the vendee brings a suit for possession against the person in possession it lies upon the plaintiff to show that his vendor was in possession at some period within 12 years prior to the date of the sale—*Deba v Rohtagi* 29 All 479 (480) *Lashinath v Shridhar* 16 Bom 343 (346) (In these cases, Article 142 was applied, and it is not clear from the judgments why Article 136 was not applied) Mr Rustomji (3rd Edn p 534) comments on these cases as follows 'These decisions are not intelligible and it is submitted that the plaintiff ought to go further and show that his vendor was in possession within 12 years of the suit and not merely that he was in possession within 12 years of the sale. In other words as was observed in 23 All 442, the plaintiff vendee must show that supposing no sale had taken place, the vendor's title would have been alive when the vendee's suit is brought'

575 Suits under this Article—A suit by a purchaser of the equity of redemption for possession of the immoveable property is governed by this Article and the period begins to run from the date of redemption by the vendor mortgagor that being the date on which the vendor became entitled to possession—*Badri Mal v Gopal* 130 P R 1906

A suit by a purchaser from a member of a joint Hindu family who is alleged to have been out of possession at the date of sale falls under Art 136 and not under Art 127—*Venkayya v Ramkrishnamma* 9 M L T 397 9 Ind Cas 495 *Ram Lalli v Durga Charan* 11 Cal 680 (682)

A decree directed that A should obtain possession of a house from D if he paid B a certain sum. B was not paid according to the decree and A sold such interest as he had in the house to C. C then sued B for recovery of possession of the house on payment of the said sum. Held that the suit fell under this Article and not under Article 144. Further the decree did not create any mortgage or charge and Article 148 did not apply.—*Raghu nath v Kalki* 32 Ind Cas 353 2 O L J 500

137—Like suit by a purchaser at a sale in execution of a decree, when the judgment-debtor was out of	Twelve years	When the judgment-debtor is first entitled to possession
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possession at the date
of the sale.

576. Scope —Art 137 applies to suits brought by auction purchasers against *third persons* (i.e., persons other than the vendor or judgment-debtor) in possession of the land, in whose favour limitation runs against the purchaser in the same way as it would against the owner with whose right the purchaser is clothed, it does not apply to a suit against the judgment-debtor himself or his representatives —*Lakshman v Bisai Singh*, 15 Bom 261 (264), *Gajadhar v Ram Lakhan*, 5 Ind Cas 273; *Ram Lakhan v Gajadhar*, 33 All 224 (227), 7 A L J 1184

If however the third person in possession of the land is a person who has no shadow of a title but is a mere trespasser or a stranger in the eye of the law, the suit brought against him by the auction purchaser falls under Article 144 and not under Article 137, and the period of limitation runs from the time when the person had taken possession of the land—*Lakshman v Bisansingh*, 15 Bom 261 (264), *Lakshman v Moru*, 16 Bom 722 (728)

If the judgment-debtor was out of possession at the date of sale, but subsequently recovered possession from the trespasser, a suit by the auction purchaser against the judgment-debtor for possession is governed by Art 144 and is not barred if brought within twelve years from the date of such recovery of possession by the judgment-debtor, though more than 12 years after the judgment-debtor had been dispossessed—*Ram Lakhan v Gajadhar*, 33 All 224 (228), *Gajadhar v Ram Lakhan*, 5 Ind Cas 273

577. Cases —A sale-deed was executed on the 25th of September 1867 by A in favour of B but B never entered into possession. On the 14th November 1874 the land was sold in execution of a decree against B. The auction purchaser brought a suit on the 26th September 1879 for recovery of the land against the original vendor (A). It was held that the suit was barred by limitation under Art 137, as more than 12 years had elapsed from the time when B became entitled to possession (25th Sept 1867)—*Anand Coomari v Ali Jamin* 11 Cal 229 (231)

Where at a partition between the members of a joint Hindu family consisting of father and three sons, the land in dispute was allotted to the father and mother for their life and after their death the land was to be divided among the sons equally, the sons got a vested interest and not a contingent interest in the land. So, if a son mortgaged his interest in that land during the lifetime of the parents, the right of the auction purchaser at a sale held under the mortgage-decree to sue for possession accrued under this Article on the date of death of the parents, that being the date on which the son was entitled to possession—*Raghunath v. Madhav*, 25 Bom L R 456, A I R 1923 Bom 415

Three undivided brothers (B, R and A) mortgaged their joint property

in 1870 In 1875 B's share was sold in execution of a decree against him and was purchased by the plaintiff In 1877 B and his two brothers sold their property to defendants who at once paid off the mortgage and took possession In 1890 the plaintiff sued for possession of B's share; it was held that the suit was barred by this Article because B became entitled to possession of his share in 1877 when the mortgage was paid off by the defendants and their possession had been since then adverse to the plaintiff—*Ganesh v Ramchandra* 20 Bom 557 (561)

Where A has obtained a decree against B and at a sale in execution of that decree has purchased the property himself but has obtained symbolical possession and then C obtains a decree against A and purchases the property at the sale held in execution of his decree a suit brought by C to recover the property fails under this Article because his judgment debtor (A) who has obtained only symbolical possession is said to be 'out of possession within the meaning of this Article, the actual possession being with B and the period of limitation runs when A is 'entitled to possession' i.e. when A has obtained symbolical possession—*Ram Sumran v Genda Lal* 22 C L J 574 29 Ind Cas 841 (842)

138—Like suit by a Twelve The date when the sale purchaser at a sale years becomes absolute in execution of a decree, when the judgment-debtor was in possession at the date of the sale

Change —The words 'the date of the sale' in the Act of 1877 have been changed into 'the date when the sale becomes absolute'

578 Scope —This Article only applies to suits in which the auction-purchaser is the plaintiff and the judgment debtor or some one claiming through him is the defendant It does not apply to a suit brought by one auction purchaser against another auction-purchaser of the same property—*Bhagwant v Bhola* 35 All 432 18 Ind Cas 465 (reversing *Bhola v Bhagwant* 10 A L J 13 15 Ind Cas 10)

This Article applies to suits brought against a judgment-debtor or against any person claiming through him and remaining in possession after purchase made by the auction purchaser It does not apply where the defendant bases his claim to title and possession as a trespasser relying upon possession *ad esse* to the judgment-debtor Art 142 or 144 applies to such a case—*Bhikkhad Bhunjan v Upendra* 4 P L J 463 (471) *Janki Nath v Baskunika* 27 C W N 259 36 C L J 140 A I R 1913 Cal 176.

This Article applies not merely to a suit brought by the auction-purchaser, but also to a suit brought by a person claiming through such auction purchaser, *e.g.* a purchaser from the auction purchaser—*Sats Prasad v Jogesh*, 31 Cal 681, 684 F B (overruling *Mohima v Nobin*, 23 Cal 49), *Arumuga v Chockalingam* 15 Mad 331, *Pullavva v Ramayya*, 18 Mad 144, *Gorind v Gangaji*, 23 Bom 246

579 Limitation —Under the Act of 1877, the period of limitation ran from the "date of sale" which meant the date of actual sale, and not the date of its confirmation—*Venkataalingam v Veerasami*, 17 Mad 89; *Corinda v Gangaji*, 23 Bom 246, *Ahamed Kutta v Rahman*, 25 Mad 99. These cases are no longer good law as under the present Act time runs from the date of confirmation of the sale

If the defendant is a person claiming through the judgment-debtor, he can tack the period of his own possession to the period during which the judgment-debtor had been in possession after the execution sale, and if the whole period exceeds 12 years, the plaintiff's suit will be barred—*Namdev v Rama Chandra*, 18 Bom 37 (40)

580 Effect of symbolical possession —Symbolical possession given by the Court to a decree holder is equivalent to actual possession as against the judgment-debtor, and gives to the auction purchaser a new starting point of limitation—*Jagabandhu v Ram Chunder* 5 Cal 584, 588 (F B); *Janaki Nath v Baskuntha*, 36 C L J 140, *Mangli Prasad v Debi Din*, 19 All 499 (501), *Rajendra v Bhagwan* 39 All 460 (462) *Narain v Latta*, 21 All 269 (271), *Umbika Charan v Madhub* 4 Cal 870 (876) *Joggobundhu v Purnanand*, 16 Cal 530 Hence, if after the date on which symbolical possession was given to the auction purchaser, the judgment debtor continued in possession, his possession became that of a trespasser from that date and gave the execution purchaser a fresh cause of action a suit upon which was governed by Art 144 and the period should be reckoned from the date of delivery of the symbolical possession—*Hari Mohan v. Baburahi*, 24 Cal 715 (719, 720), *Narain v Latta Prasad* 21 All 269 (271); *Janaki Nath v Baskuntha*, 36 C L J 140, A I R 1922 Cal 175, 27 C W. N 259

But symbolical possession is equivalent to actual possession only where the property of the judgment-debtor is in the possession of tenants or of other persons entitled to occupy the property so that the only possible method in which the auction purchaser can take possession is symbolical possession—*Mahadev v Janu Namji*, 36 Bom 373 (F B) *Joggobundhu v Ram Chandra*, 5 Cal 584, *Lakshman v Moru* 16 Bom 722 (728) Thus, where a person purchased at an execution sale an undivided one third share of certain muafi land, which was of such a nature that it did not permit of actual possession being delivered, and formal possession was therefore given to him, held that a suit by him for actual possession brought within 12 years from the date of the delivery of formal possession but more

than 12 years after the date of confirmation of the sale, was not barred—*Raendra v Bhagwan* 39 All 460 (463) But if the property is not in the possession of tenants the symbolical possession taken by the auction purchaser will not amount to actual possession, and the judgment-debtor will be regarded as being still in possession. No fresh period of limitation will run from the date of the taking of symbolical possession—*Mahale v Janu Vamsi* 36 Bom 373 378 (F B) 11 Ind Cas 447 (overruling *Mahadev v Parashram* 25 Bom 358 and *Gopa' v Krishnarao* 25 Bom 275) But the Calcutta High Court did not lay any stress on this distinction in the case of 14 Cal 715 (cited above) the property in this case was a house in the occupation of the judgment-debtor of which the auction purchaser could have taken actual possession instead of taking symbolical possession. But Banerjee J observed 'Though actual possession might have been taken by the execution purchaser in this case, still as he obtained possession in some form through an officer of the Court and by process of law, and as the judgment-debtor was and must be taken to have been a party to the proceeding relating to the taking of the possession it is not open to the judgment-debtor to say that the whole proceeding should be taken as a nullity and that the execution purchaser must be treated as one who has never obtained any possession at all.'

Symbolical possession given to the auction purchaser will not be equivalent to actual possession and will not give a fresh start for limitation for a suit brought against a third party (i.e. a person who was not a party to the delivery of possession—*Nasiruddin v Saydur*, 19 C L J 209, *Juggobundhoo v Ram Chunder* 5 Cal 584 588 (F B) *Runjit v Bunwari*, 10 Cal 993 (995) *Narain v Lalla* 21 All 269 (271), *Harjivan v Shikram*, 19 Bom 620 (624) *Lalshanian v Moru* 16 Bom 722 (7-8), *Ram Sumnun v Genda Lal* 22 C L J 574 29 Ind Cas 841

The period of limitation for a suit by the auction purchaser against the third party will run (under Article 144) from the date of the latter's adverse possession—*Narain Das v Lalla* (supra)

581 Section 47, C P. Code.—If the decreeholder is himself the auction-purchaser of the property in execution of his decree the question arises whether his claim for possession of the property purchased must be determined by the Court in the execution department under the provisions of sec 47 C P Code or whether a separate suit is maintainable. It has been held by Patna and Allahabad High Courts that the question relating to the delivery of possession does not relate to the execution discharge or satisfaction of the decree and does not come under sec 47 of the C P Code; and hence the proper proceeding relating to the delivery of possession is not by way of an application under O 21, R 95 for which the period of limitation is prescribed by Article 180 but by way of a regular suit, which is governed by Article 138—*Sridhar v Jageshwar*, 4 P L J 716 (730 733), *Bhagwati v Danzari*, 31 All 82 (1 B)

But the Madras and Calcutta High Courts are of opinion that proceedings for delivery of possession to the auction purchaser are proceedings in execution of the decree and fall within the scope of sec 47 C P Code and that a decreeholder who becomes the auction purchaser cannot file a separate suit as contemplated by Article 138 but must proceed in execution in accordance with sec 47 that Article 138 cannot override the provisions of sec 47 C P Code—*Sadashiv v Narayan* 35 Bom 452 11 Ind Cas 98, *Kailash v Gopal* 30 C W N 649 (F B), A I R 1926 Cal 798 95 Ind Cas 494

139—By a landlord to Twelve When the tenancy is
recover possession years determined
from a tenant

582 Scope —This Article applies where the suit is brought for possession and where the tenancy has been determined Where the plaintiff brought a suit not for possession by ejectment of the tenants but for a declaration that the village in suit did not constitute the permanent *thika* right of the defendants as erroneously entered in the record of rights and that it was in the possession of the defendants in temporary *thika* to be resumed year after year and after service of due notice held that Article 139 did not apply because it was not a suit for possession and also because the tenancy had not determined but was still continuing—*Tekait Hav naraya v Darslan Deo* 3 Pat 403 (407) 6 P L T 315 A I R 1924 Pat 560

This Article which provides for a suit by a landlord to recover possession from a tenant and gives 12 years from the determination of the tenancy refers to suits in respect of tenancies in which the leases have expired and so have terminated or in respect of tenancies at will terminable by due notice It does not refer to a suit by which the plaintiff seeks to recover from the holder of a title permanent in its tenure as for instance where the defendants are in possession of the property by virtue of a title which is of a permanent character not determinable by notice from the plaintiff—*Madho Kooery v Tekait Ram Chunder* 9 Cal 411 (417) A suit to recover possession from the defendants who claim to hold as permanent mokarandars is governed by Article 144 and not by Article 139—*Ram Rachhya v Kamakhya Naran* 4 Pat 139 6 P L T 12 A I R 1925 Pat 216

A suit to recover possession from the representatives of the original tenant after the determination of the tenancy (no fresh tenancy having been created between the landlord and the original tenant's representatives either expressly or by assent of the landlord after the termination of the tenancy) is governed by this Article and not by Article 144 and is barred if brought more than 12 years after the tenancy expired—*Sudaimutha v Sappani* 48 M L J 185 A I R 1925 Mad 446 86 Ind Cas

than 12 years after the date of confirmation of the sale, was not barred—*Indra v Bhagwan* 39 All 460 (463). But if the property is not in the possession of tenants the symbolical possession taken by the auction purchaser will not amount to actual possession, and the judgment-debtor will be regarded as being still in possession. No fresh period of limitation will run from the date of the taking of symbolical possession—*Mahadev v Jai Namp* 35 Bom 313, 378 (F B) 14 Ind Cas 447 (overruling *Mahadev v Induram* 3 Bom 358 and *Gopal v Krishnarao*, 25 Bom 275). But the Calcutta High Court did not lay any stress on this distinction, in the case of 24 C 113 (cited above) the property in this case was a house in the occupation of the judgment debtor of which the auction purchaser could have taken actual possession instead of taking symbolical possession. But Justice J observed: "Though actual possession might have been taken by the execution purchaser in this case, still as he obtained possession in some form through an officer of the Court and by process of law, and as the judgment-debtor was and must be taken to have been a party to the proceeding relating to the taking of the possession, it is not open to the judgment debtor to say that the whole proceeding should be taken as a nullity and that the execution purchaser must be treated as one who has never obtained any possession at all."

Symbolical possession given to the auction purchaser will not be equivalent to actual possession and will not give a fresh start for limitation for a suit brought against a third party (i.e. a person who was not a party to the delivery of possession)—*Nasiruddin v Sajidur*, 19 C L J. 209; *Juggolundhoo v Ham Chunder* 3 Cal 584, 583 (F B), *Ranjit v. Bhanwar*, 10 Cal 503 (475), *Narain v Lalla* 21 All 269 (271), *Harman v Shuram*, 11 Bom 60 (64), *Latuman v Moru*, 16 Bom 722 (728), *Ram Sumnath v Gunda Lal* 22 C L J 574, 29 Ind Cas 841.

The period of limitation for a suit by the auction purchaser against the third party will run (under Article 144) from the date of the latter's adverse possession—*Narain Das v Lalla* (supra).

581. Section 47, C P. Code.—If the decreeholder is himself the auction-purchaser of the property in execution of his decree, the question arises whether his claim for possession of the property purchased must be determined by the Court in the execution department under the provisions of sec 47 C P Code or whether a separate suit is maintainable. It has been held by Patna and Allahabad High Courts that the question relating to the delivery of possession does not relate to the execution, discharge or satisfaction of the decree and does not come under sec 47 of the C. P. Code; and hence the proper proceeding relating to the delivery of possession is not by way of an application under O 21, R 95, for which the period of limitation is prescribed by Article 180, but by way of a regular suit, which is governed by Article 138—*Bridhar v. Jagdishwar*, 4 P. L J. 716 (730, 733); *Bhagwan v. Bhanwar*, 31 All. 82 (F. B).

But the Madras and Calcutta High Courts are of opinion that proceedings for delivery of possession to the auction purchaser are proceedings in execution of the decree and fall within the scope of sec 47 C P Code, and that a decreeholder who becomes the auction-purchaser cannot file a separate suit as contemplated by Article 138 but must proceed in execution in accordance with sec 47 that Article 138 cannot override the provisions of sec. 47 C P Code—*Sadashiv v Narayan*, 35 Bom 452, 11 Ind Cas 987, *Kailash v Gopal*, 30 C W N 649 (F B), A. I R. 1926 Cal 798, 95 Ind. Cas 494

139.—By a landlord to Twelve When the tenancy is recover possession years determined, from a tenant.

582. Scope :—This Article applies where the suit is brought for possession, and where the tenancy has been determined Where the plaintiff brought a suit not for possession by ejectment of the tenants, but for a declaration that the village in suit did not constitute the permanent *thika* right of the defendants as erroneously entered in the record of rights, and that it was in the possession of the defendants in temporary *thika* to be resumed year after year and after service of due notice, held that Article 139 did not apply, because it was not a suit for possession and also because the tenancy had not determined but was still continuing—*Tekait Harinarayan v Darshan Deo*, 3 Pat 403 (407), 6 P L T 315 A I R 1924 Pat 560

This Article which provides for a suit by a landlord to recover possession from a tenant, and gives 12 years from the determination of the tenancy, refers to suits in respect of tenancies in which the leases have expired and so have terminated, or in respect of tenancies at will terminable by due notice. It does not refer to a suit by which the plaintiff seeks to recover from the holder of a title permanent in its tenure, as for instance where the defendants are in possession of the property by virtue of a title which is of a permanent character not determinable by notice from the plaintiff—*Madho Kooery v. Tekait Ram Chunder*, 9 Cal 411 (417) A suit to recover possession from the defendants who claim to hold as permanent *mokurandars* is governed by Article 144, and not by Article 139—*Ram Rachhya v. Kamakhya Naran*, 4 Pat 139, 6 P L T. 12, A I R 1925 Pat. 216

A suit to recover possession from the representatives of the original tenant after the determination of the tenancy (no fresh tenancy having been created between the landlord and the original tenant's representatives, either expressly or by assent of the landlord after the termination of the tenancy) is governed by this Article and not by Article 144, and is barred if brought more than 12 years after the tenancy expired—*Sudalaimutha v. Sappani*, 48 M L J. 185, A. I R. 1925 Mad. 446 86 Ind. Cas. 440.

Subbraveeti Ramiah v Gundula Ramannah 33 Mad 260 (261) dissenting
fr m Vadapalli v Dronamraju 31 Mad 163

583 **D termination of tenancy**—(As to when a tenancy determines see sec 131 of the Transfer of Property Act) When the tenant holds the land for a fixed period under a lease the tenancy determines at the expiration of that period. If after the expiration of that period the tenant holds over without the assent of the landlord or without payment of rent or without any fresh agreement of tenancy being entered into such holding over (which in English law is called tenancy by sufferance) will not amount to a fresh tenancy. The period of limitation for a suit to recover possession from the tenant will run from the expiry of the period of the lease. *Kanthappa v Seshappa* 22 Bom 893 (897) *Chandri v Dayi Bhai* 24 B m 504 (508) *Hari Gir v Kumar Kamahya Narain* 3 Pat 534 (540) (dissenting from *Krisnaji v Anthaji* 18 Bom 256) *Pusa Mal v Mahduri* 31 All 514 (518) *Itappan v Manavikrama* 21 Mad 153 (163) *Vadapalli v Dronamraju* 31 Mad 163 (167) (dissenting from *Adimulam v Pir Riwutham* 8 Mad 424) *Seshamma v Chiekaya* 25 Mad 507 (511), *Akunni v Madan Mohan* 31 All 318 (321) *Madan Mohan v Rameshwar*, 7 C L J 615 *Umar Baisakha v Baldeo Singh* 97 P R 1915 *Debi Prasad v Gujar* 20 A L J 616 *Bisheshwar v Hundan* 44 All 583 (585) Where a demise or agreement specifies the term or event upon which the tenancy is to end on the expiry of that term or upon the happening of that event the tenancy is determined *ipso facto*—*Right v Darby* 1 T R 162 *Messenger v Armstrong* 1 T R 51 *Gabb v Stokes* 8 East 358 (361) *Hilson v Alboft* 9 B & C 88 *Doe v Inglis* 3 Taunt 51 *Doe v Sayer* 3 Camp 8 *Shivrudappa v Balappa* 23 Bom 283 (286) Where however the landlord does some act (e g takes rent) to indicate his assent to the continuance of the tenancy that act will convert the tenancy by sufferance into a tenancy at will from year to year or month to month (see 216 Transfer of Property Act) and the period of limitation for a suit for recovery of possession from the tenant at will will run from the termination of such tenancy (and not from the termination of the original tenancy)—*Ramchandra v Bhikhambar* 37 Cal 674 (679) *Akunni v Madan Mohan* 31 All 318 (321) *Tekaji Harnarayan v Darshan Deo* 3 Pat 403 (410) *Kanthappa v Seshappa* 22 Bom 893 (898) *Ram Lochan v Kamahya* 4 P L T 123 71 Ind Cas 570

A tenancy for a definite term does not determine by reason of the tenant's disavowal of the landlord's title but it determines only when the landlord does some act (e g serves a notice to quit) by which he indicates his option of terminating the lease by reason of such disavowal—*Shrinivas v Mulusami* 24 Mad 246 (251) And unless the landlord elects to do so the tenancy remains unaffected in spite of the tenant's denial of the landlord's right—*Itappan v Manavikrama* 21 Mad 153 (160 163) But in case of a tenant at will the denial of the

landlord's title is an evidence of the cessation of the tenancy—*Ibid* (at p 164)

A person who lawfully came into possession of land as tenant from year to year or for a term of years cannot by setting up *during the continuance* of such relation any title adverse to that of the landlord acquire by the operation of the law of limitation a title as owner or any other title inconsistent with that under which he was let into possession. In other words, so long as the tenancy continues time does not run against the landlord in lessee's favour. The landlord's title can be extinguished only at the expiration of the period prescribed by Article 139 and under this Article the period will commence to run only when the tenancy is determined. If after the determination of the tenancy the tenant remains in possession as trespasser, for the statutory period (12 years, Art 144) he will by prescription acquire a right as owner or such limited estate as he might prescribe for—*Seshamma v Chichaya*, 25 Mad 507 (511), *Illappan v Manavikrama*, 21 Mad 153 (163). Thus, where the defendants had, after the expiration of a lease, held over as yearly tenants and then after the determination of that tenancy, continued to hold possession, claiming that they were permanent tenants, for more than 12 years (Art 144) *held* that the defendants had acquired by prescription a right to hold possession as permanent tenants—*Parimeshwaram v Krishnan*, 26 Mad 535 (537).

A person holding a land for his life cannot by merely giving a notice that he claims to be holding on a perpetual or hereditary tenure make his possession adverse so as to bar a suit for possession on the expiration of the life tenancy—*Bens Pershad v Dudh Nath*, 27 Cal 156 166 (P C).

By the customary law of Malabar, a tenant under a Kanom or Kun^{*} kanom lease is entitled not to be ejected until the expiration of 12 years. But where no time is fixed for the duration of the lease (i.e. where the lease is for an indefinite period) it does not under the customary law determine on the expiration of 12 years from its date consequently, in such a case, a suit for possession brought 14 years after the expiration of 12 years from the date of the lease is not barred—*Kelappan v Madhavi*, 25 Mad 452 (453).

A lease for life expires on the death of the lessee and therefore a suit for possession against the heirs of the original lessee is barred under this Article if brought more than 12 years after the death of the lessee, in the absence of a fresh tenancy being created between the parties—*Hamakhya Narain v Beeku Singh*, 6 P L T 361, 88 Ind Cas 483, A I R 1925 Pat 499.

Mere non payment of rent for over 12 years before the institution of the landlord's suit for possession, does not amount to termination of the tenancy—*Prem Sukh v Bhupia*, 2 All 517 (F B), *Tota v Sakota*, P R 1888.

A disobedience by the tenant known to the landlord and

by payment of rent to a third party does not at any rate as long as the term of his tenancy lasts make the tenant's possession adverse though in the case of a tenancy at will such conduct might afford evidence of the determination of the tenancy—*Illappan v Manattikrama* 21 Mad 153 (160) *Doel Grates v Hells* 10 A & E 427 (434)

Plea of tenancy and limitation in the alternative—In a suit for possession of land brought against a tenant who is really a trespasser the defendant merely by alleging tenancy in his written statement does not preclude himself from setting up the defence of the law of limitation—*Dino Moner v Doorga Pershad* 21 W R 70 (74) F B When a suit is brought to recover possession the defendant may plead that he is plaintiff's tenant and at the same time may rely on the statute of limitation. If he fails to establish the former plea it is still open to him to rely on the second plea and in that event the suit will be treated not as a suit by a landlord against a tenant but as one to eject a trespasser (Art 144) who has set up a pretended tenancy—*Maidin Saiba v Nagapa* 7 Bom 96 (99) *Kesavuddi v Haro Mohan* 7 C W N 294

584 *Burden of proof*—It is not sufficient for the plaintiff merely to allege that the defendant is his tenant. The burden lies on the plaintiff to prove that the defendant is his tenant. If the plaintiff fails to prove the tenancy the suit falls under Article 142 and the plaintiff must prove that he had been in possession within 12 years before suit. And if the plaintiff fails to prove this his suit is barred—*Haji Khan v Baldeo Das* 24 All 90 (93)

When there is proof of the relation of landlord and tenant it lies upon the defendant tenant to shew that the tenancy was determined more than twelve years before suit—*Tiruchirra v Sangurien* 3 Mad 118 *Attar Singh v Ram Ditta* 110 F R 1881 *Adinulam v Pir Ravutham* 8 Mad 424 If the defendant tenant admits that the plaintiff's ownership continued up to a certain period he must shew under Article 139 when the tenancy terminated or he must shew under Article 144 when his adverse possession commenced before he can set up adverse possession—*Tulshi Bai v Panchhod* 26 Bom 442 (444)

Once the relation of landlord and tenant is established the cessation of the tenancy must be established by the tenant by means of affirmative proof over and above the mere non payment of rent—*Pran Sukh v Dhifia* 2 All 517 (F B)

140—By a remainderman, a reversioner (other than a landlord) or a devisee, for possession of immovable property

Twelve years.	When his estate falls into possession
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585 Suit by reversioner, &c. —Where a grant of immoveable property is made to a person for life the period of limitation for a suit by the grantor to recover possession of the property the grantee being dead, will be twelve years from the death of the grantee—*Kuttyassan v Mayan*, 14 Mad 495 (498)

This Article applies to a suit by a reversioner other than a landlord Article 139 deals expressly with the case of a landlord suing as such, Article 140 deals with the case of a reversioner other than a landlord as such suing his tenant Thus, a suit by a landlord to recover possession from persons who have dispossessed the tenants falls under this Article—*Krishna Gotard v Hari Churn* 9 Cal 367 (370) See also *Ram Chandra v Bhikhambar*, 37 Cal 674

The words 'remainderman,' 'reversioner' and devisee are used in this Article as technical terms of English law Hence according to that interpretation the word 'reversioner' in this Article does not include a reversioner who succeeds on the death of a Hindu widow—*Bala v Jati*, 255 P R. 1883, *Roda v Harnam* 18 P R 1895 (F B) *Moro v Balaji*, 19 Bom 809 (814), *Maharaja Kesho Prasad v Madho Prasad*, 3 Pat. 880 (897)

The plaintiffs brought a suit as devisees under a will to obtain possession of certain immoveable property, they asked also that an adoption and all other conditions of title relied on by the defendant might be set aside and their sole right to the property declared Held that the suit fell under Article 140 and not under Article 118—*Fannyamma v Manjaya* 21 Bom 159 Taking Article 118 with Articles 140 and 141 it appears that when a person claiming to be the next reversionary heir and being aware of an adoption having taken place seeks to obtain a bare declaratory relief in the life time of the widow who adopted the boy to her deceased husband he is bound to bring his suit within six years from the time of his knowledge (Art 118) but that will not prevent the reversioner from suing to obtain possession of the estate when it falls into possession (Art 140) or when the widow dies (Art 141) if the suit is commenced within 12 years from that time—*Lala Parbhu v Mylne*, 14 Cal 401 (417) In this case the word 'reversioner' in Art 140 has been wrongly interpreted

This Article does not apply unless the plaintiff is out of possession Thus, a property was bequeathed to three persons in common, but after the testator's death only two remained in possession of the property, and the other devisee lived in a separate house of his own and the evidence of his participation in the property of the two houses was very slight Held that although the third devisee did not participate in the property, still the entry of the other two must be held as entry on behalf of all (as they were joint tenants), unless there was clear evidence to hold adversely Consequently, the third devisee was in possession through the other devisees, and his suit for possession does not fall under this Article, nor is it barred

under any other Article—*Audipuram v Appusundram*, 5 M L T 103, 2 Ind Cas 311

A Hindu testator (who was the Maharaja of a Raj estate) died in 1894 leaving a will appointing his widow as executrix and giving her a life-estate in the properties and the remainder to any son that might be adopted by the widow. The widow died in 1907 and an adoption made by her was declared to be invalid. The plaintiff (a successor to the Maharaja) brought a suit for recovery of possession of those properties. Held that Article 140 did not apply as he was neither a remainderman, reversioner nor a devisee. A reversion arises where the grantor grants a particular estate to a person and does not dispose of the remainder. That which is not disposed of remains in the grantor and is called a reversion. It is the interest in land undisposed of which reverts to the grantor after the exhaustion of the particular estate. But here the complete estate was devised by the testator (the life estate to the Maharam and the remainder to the son to be adopted) hence the plaintiff was not a reversioner. Nor was he a remainderman for the remainder was devised to the son to be adopted by the widow. Nor was the plaintiff a devisee—*Maharaja Kesho Prasad v Madho Prasad* 3 Pat 880 (897) A I R 1924 Pat 721, 5 P L T 513 83 Ind Cas 812

It has now been settled by authorities (see Note 389 under Article 141 *post*) that 12 years adverse possession against a life tenant does not bar the right of the reversioners whose right accrues only when the estate falls into possession. But where possession had begun to be adverse before the life tenant entered into possession, Article 140 will not apply, and the continuous running of time will not be prevented by the interposition of the life tenant. The adverse possession would be not only prejudicial to the life-tenant but also to the remainderman or reversioner. Thus, where after the death of the testator but before the administration was completed a stranger entered into possession of the property, the beneficiary (who in this case is a life tenant the widow of the testator) will be barred if the executor fails to sue within the period prescribed by law, for the estate is still the estate of the testator and not the estate of the beneficiary (life tenant) and consequently a title that may be acquired by a stranger by lapse of time will be a title acquired against the testator and not against the life tenant. Both Arts 140 and 141 presuppose an estate in a life tenant or in a Hindu or Muhammadan female but where in respect of any particular property the title of the testator is itself extinguished under sec 28 by reason of the executor failing to sue within the period prescribed by law, that particular property will not descend to the life tenant or to the Hindu or Muhammadan female, and consequently the case will not attract the operation of Article 140 or 141—*Maharaja Kesho Prasad v Madho Prasad (Dumraon case)*, 3 Pat 880 (906), A I R 19-4 Pat 721, 5 P. L. T 513 83 Ind Cas, 812

586 Suit by adopted son —The childless widow of a Hindu being in possession of his property as his heir sold it to the defendants in 1868. Afterwards in 1888 she adopted a son who in 1890 brought the present suit to recover the alienated property. It was held that the suit did not fall under this Article because the adopted son as such suing for present possession of his father's estate was not a remainderman reversioner or devisee within the meaning of this Article. The suit fell under Article 144—*Moro v Balaji* 19 Bom 809 (819) *Sreeramulu v Kristamma* 16 Mad 143 (147) *Sita Ram v Rajaram* 48 Ind Cas 230 (Nag)

587 When the estate falls into possession —The property left by a will falls into possession under the Hindu Law immediately upon the death of the testator and therefore a suit claiming title to shares in immoveable property under a will is barred unless brought within 12 years from the date of the testator's death under this Article—*Mylapore Iyaiswamy v Yeokay* 14 Cal 801 808 (P C). The mere fact that there is a provision in the will to the effect that the property devised should be in the possession of a manager until the devisee should attain the age of 30 years will not prevent the estate from falling into possession immediately on the date of the testator's death—*Krishna v Panchuram* 17 Cal 272 (76)

Since the cause of action accrues to a remainderman or reversioner only when the estate falls into possession an adverse possession for any length of time against a tenant for life is ineffectual against the remainderman or reversioner whose right to possession only accrues on the death of the tenant for life—*Naunihal v Skinner* 47 All 803 A I R 1925 All 707 Cf the cases cited in Note 589 under Article 141

141 —Like suit by a	Twelve	When the female dies
Hindu or Muham-	years	
madan entitled to		
the possession of im-		
moveable property		
on the death of a		
Hindu or Muham-		
madan female		

History of this Article. —In order to arrive at a correct notion of the scope of this Article it is useful to refer to the history of the enactment of this Article. Under section 1 clause 12 of the Limitation Act XIV of 1859 the period of limitation applicable to suits for the recovery of immoveable property or any interest in immoveable property to which no other provision of the Act applied was 12 years from the time the cause of action arose. This clause had been interpreted by the Court in a sense

bore hardly upon the rights of the reversionary heir under the Hindu law, for it had been held that adverse possession against a Hindu widow entitled to her deceased husband's estate was adverse possession also against the male heir who would be entitled to the property after her death (See Note 589 below) The consequence was that a reversionary heir who had no right to possession during the widow's lifetime might lose his property to a person who had asserted adverse possession against the widow for a period of 12 years Then came Act IX of 1871, in which Article 142 provided as follows "Like suit by a Hindu entitled to the possession of immoveable property on the death of a Hindu widow—Twelve years—When the widow dies" Thus, special provision was made for the reversionary heir under the Hindu Law, who was given 12 years from the death of the widow to bring his suit The effect of this was that time counting for adverse possession could not begin to run against the reversioner until he became entitled to enter into possession (See Note 589, below) But it came to be recognised that the rule laid down in the Act of 1871 was imperfect, inasmuch as it referred only to the reversionary heir succeeding upon the death of a Hindu widow, whereas other Hindu females, e.g. daughter, mother, also had only a limited estate in the property inherited from males So, in the later Act, XV of 1877, the scope of this Article was enlarged, so as to give the same period to Hindus and Muhammadans entitled to the possession of immoveable property on the death of a Hindu or Muhammadan female The extension of the rule to Muhammadans was probably intended to meet certain cases in which by custom or for some other reason persons who had been Hindus and had become Muhammadans were still bound by their old personal law in spite of their change of religion The same rule has been preserved in Article 141 of the present Limitation Act of 1908—*Ghisa v Gajraj*, 18 O C 289, 33 Ind Cas 371 (375)

588. Scope of Article.—This Article applies only when the female (on whose death the plaintiff is entitled to possession) had been out of possession, if the female had been in possession of the property till her death, this Article would not apply—*Gobinda v Upendra*, 47 Cal 274 (277) Moreover, Article 141 should be construed so as to cover those cases in which the cause of action arises on the death of the female and the only obstacle to the reversioner seeking possession is either an act of the female or her inaction, resulting in either case in the loss of possession and the need of a suit by the reversioner—*Narayanasmami v Periaswamy*, 44 Mad 951 (957) This shows that the loss of possession must have taken place in the lifetime of the widow through her act or omission

This fact was totally ignored in the case of *Gajadhar v Parrati*, 33 All. 312 In this case, one A died leaving two widows B and C as heirs; then B died and the surviving widow C was in sole possession of the property After the death of C the property was taken possession of by a person

who had no right to it and that person occupied the estate for more than 12 years. Afterwards a reversioner of A sued to recover possession. It was held that the suit was barred for time ran *under Article 141* from the date of the death of C. The conclusion was correct but Article 141 was wrongly applied because C died while *in* possession of the property the proper Article applicable to the case was Art 144.

The next question is whether the expression like suit means only a suit for the possession of immoveable property or whether it is to be read with Article 140 so as to mean a suit for the possession of immoveable property by a remainderman or reversioner who is a Hindu or Mahomedan entitled to the possession on the death of a Hindu or Mahomedan female? In other words does this Article apply to all property claimed on the death of a female whether her right to it was limited or unlimited or is it restricted to suits brought by reversioners who claim on the death of a female who was entitled only to a limited estate?

The correct interpretation of this Article is that the expression like suit means a suit by a remainderman or reversioner for possession of immoveable property that is a suit by those heirs of the original propositus who claim on the death of a female entitled only to a limited estate and who are constantly styled reversionary heirs and not unfrequently remaindermen. This Article applies to those cases where there is an estate of the nature of a fee simple or some analogous estate out of which there has been carved by operation of law or otherwise an estate to be held by a female for her life and a remainderman or reversioner is entitled to the remainder or reversion on the death of that female. *Starling* pp 383 389.

This Article does not apply to a suit by an heir at law of female (as in the case of a son succeeding to the absolute estate of his mother) for possession of immoveable property in that character it only applies to a suit by a person who before the death of a female occupied the position of a remainderman or a reversioner or a devisee and on the death of the female sues on the basis of such title as remainderman reversioner or devisee—*Hashmat Begum v Mashar Hussain* 10 All 343 (346). This Article must be read with Article 140 and refers to suits brought by persons claiming under an independent title on the death of a Hindu or Mahomedan female, it does not apply to the case of a person suing on the very same cause of action which accrued to a Hindu female and who acquires his right to sue as her heir—*Azam Bhuyan v Faisuddin* 12 Cal 594 (596) *Malharjan v Amrita* 42 Bom 714 (717) *Ghisa v Gajraj* 18 O C 289 33 Ind Cas 371. The estate of the Hindu or Muhammadan female referred to in this Article must be a limited estate and not an absolute one and the person bringing the suit must claim as the heir of the last male owner on the determination of the limited estate and not as heir of the female. Art 141 does not apply where the female had been in possession of an absolute estate—*Zarifunnissa v Shafiquraman*, 26 O C 133 *Bisheshwar v*

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The correct interpretation of this Article is that the expression 'like suit' means a suit by a remainderman or reversioner for possession of immoveable property that is a suit by those heirs of the original propositus who claim on the death of a female entitled only to a limited estate and who are constantly styled reversionary heirs and not unfrequently remaindermen. This Article applies to those cases where there is an estate of the nature of a fee simple or some analogous estate out of which there has been carved by operation of law or otherwise an estate to be held by a female for her life and a remainderman or reversioner is entitled to the remainder or reversion on the death of that female. *Starling* pp 383 389.

This Article does not apply to a suit by an heir at law of female (as in the case of a son succeeding to the absolute estate of his mother) for possession of immoveable property in that character it only applies to a suit by a person who before the death of a female occupied the position of a remainderman or a reversioner or a devisee and on the death of the female sues on the basis of such title as remainderman reversioner or devisee—*Hashmat Begum v. Nishar Hussain* 10 All 343 (346). This Article must be read with Article 140 and refers to suits brought by persons claiming under an independent title on the death of a Hindu or Mahomedan female, it does not apply to the case of a person suing on the very same cause of action which accrued to a Hindu female and who acquires his right to sue as her heir—*Azam Bhuyan v. Palanuddin* 12 Cal 594 (596) *Malkhayan v. Amrita* 42 Bom 714 (717) *Ghisa v. Gajraj* 18 O C 289 33 Ind Cas 371. The estate of the Hindu or Muhammadan female referred to in this Article must be a limited estate and not an absolute one and the person bringing the suit must claim as the heir of the last male owner on the determination of the limited estate and not as heir of the female. Art. 141 does not apply where the female had been in possession of an absolute estate—*Zarfunnissa v. Shafiquraman*, 26 O C 133 *Bishes*

Rameshar, 21 O C 14 O L J 948 44 Ind Cas 368, *Ghisa v Gajraj* 18 O C 289 This Article intends to provide a rule of limitation applicable to suits for the recovery of estates which were once estates in expectancy and which have become vested in the heir of the last male owner on the determination of the limited estate held by a Hindu or Muhammadan female—*Ghisa v Gajraj* 18 O C 289 Art 141 is merely an extension of Art 140 with special reference to persons succeeding to an estate as reversioners upon the cessation of the peculiar estate of a Hindu widow—*Jayawant v Ram Chandra*, 40 Bom 239 (245) 33 Ind Cas 484 18 Bom L R 14

Article 141 applies only to those cases in which the person who brings the suit is claiming under an independent title in the same way as remainder men and reversioners claim in suits under Article 140, but Article 141 should not be so interpreted that the estate of the Hindu or Muhammadan female referred to in this Article must be an estate created in the same way as the particular estate upon which the estate in remainder or reversion contemplated by Article 140 leans that is to say by grant or devise or that it must be an estate characterised by the same incidents which attach to such a particular estate The analogy connoted by the expression 'like suit' cannot be pushed to this extreme—*Ghisa v Gajraj* 18 O C 289

Article 141 is restricted to suits by plaintiff whose title and right as the heir of the last full owner to sue for possession accrues upon the death of a female holding a woman's qualified estate To claim the benefit of this Article the plaintiff must prove first, that there was a qualified estate in the Hindu female and secondly, that he was entitled to possession after the death of the female as the heir of the last male holder and further it must be shown that having regard to the existing law the plaintiff was entitled to the possession of the properties in dispute at the date of the suit—*Maharaja Kesho Prasad v Madho Prasad* 3 Pat 880 (897 898), A I R 1924 Pat 721, 5 P L T 513

This Article applies even though the reversioner comes in after successive female heirs, as for instance, where he comes after the widow and the mother of the last male holder, and the mother had been dispossessed—*Hokimoney v Manick*, 11 Cal 791, or where he comes after the widow and daughter, and an alienation was made by the widow—*Sham Lal v. Amarendra*, 23 Cal 460 (470), *Hanuman v Bhagaut* 19 All 357

This Article applies only where the reversioner is entitled to the possession of the property immediately on the female's death Therefore where the property was in the possession of an usufructuary mortgagee from the widow at the time of her death and then the defendant a trespasser, obtained it on redemption, and the reversioner brought a suit for possession within 12 years of the date of redemption though more than twelve years after the date of death of the widow, held that the suit fell

under Article 144 and was not barred. Article 141 did not apply as the reversioner was not entitled to possession immediately on the widow's death but was entitled only after the satisfaction of the mortgage—*Ganga Sahai v Kanhaiya Lal* 11 A L J 179 18 Ind Cas 811 (813)

Article 141 is not to be applied indiscriminately to all suits by reversioners if the suit falls under some other Article. Article 141 cannot apply merely because it is brought by a reversioner. Thus Article covers only those cases in which the cause of action is simply the death of the female and the only obstacle to the reversioner seeking to obtain possession is either an act of the female or her inaction resulting in either case in the loss of possession. It does not cover cases where the cause of action includes something more beyond this e.g. a transaction by the last male owner such as a mortgage (Art 148) a mortgage by him and transfer by the mortgagee (Art 134) a purchase in court auction (Art 138) a lease (Art 139) or a carving by him of life estates with a remainder or a reversion following it (Art 140) or any transaction involving the possibility of forfeiture (Art 143) or loss of possession by him (Art 142). In these cases the specific Article (mentioned within brackets) applies. Thus where a Hindu reversioner instituted a suit to recover possession of certain lands which had been usufructually mortgaged by the last male owner in 1866 and had been sold for consideration by the mortgagee in 1900 after the death of the last male owner and during the lifetime of his daughter who had inherited his estate and died in 1906 held that the suit fell under Article 134 and not Article 141, and was barred by limitation—*Seshu Naidu v Periasami* 44 Mad 951 (957 958)

This Article applies only to immoveable property and not to moveables—*Madhavandas v Cusondas* 21 Bom 646 (667)

583 Adverse possession against widow whether bars reversioners—Before the Act of 1871 adverse possession against the widow not only barred the widow but the reversioners also because the Act of 1859 provided a period of twelve years from the accrual of cause of action and the reversioner's cause of action accrued from the same date as the widow's cause of action viz from the date of adverse possession—*Nobin Chunder v Gurus Persad* 9 W R 505 (F B) *Amrita v Rajonee Kant* 23 W R 214 (P C) *Babu v Bishaji* 14 Bom 317 *Drobnomayee v Davis* 14 Cal 323 (344)

But the old law has undergone a change after the passing of the Act of 1871. The Acts of 1871 1877 and 1908 have specially provided a separate cause of action for the reversioner, which accrues when the female dies and the estate falls into possession; the reversioner may therefore sue within twelve years from the death of the female notwithstanding the fact that she had been out of possession for more than twelve years—*Srinath v Prosonno* 9 Cal 934 (F B) *Kohilmoney v Manick*, 11 Cal 791 (795) *Dwaraka Nath v Kolsani* 12 C L R 548 *Abhoy Charan*

v Attarmony, 13 C W N 931 (935) *Sham Lal v Amarendra* 23 Cal 460, *Ram Kali v Kedar*, 14 All 156 (F B), *Amrit v Bindesri*, 23 All 448 *Jhamman v Tiloki*, 25 All 435 (439), *Vundravandas v Cursondas*, 21 Bom 616 (652 670), *Runchordas v Parvatibai* 23 Bom 725 (P C), *Moro v Balaji*, 19 Bom 809 (816), *Mukta v Dada* 18 Bom 216 (220); *Hathi Singh v Satilal* 2 Bom L R 106, *Shrinivasa v Ramappa*, 18 M L T 226 *Subbi v Rantrishnabhatta* 42 Bom 69 (77), *Bar Khan v Sultan Malik* 43 P R 1901, *Rulia v Rulia*, 41 P R 1903, *Ganga v. Kanhaiya*, 41 All 154 [Contra—*Saroda Soondari v Doyamoyee*, 5 Cal 938 (940) But this case must be deemed to have been overruled by the Full Bench case of 9 Cal 934 See 21 Cal 8 (11)] *A fortiori* if the adverse possession against the female was for less than the full statutory period, the reversioners would have 12 years from her death to sue for possession—*Venkataramiayya v Venkatalakashmamma*, 20 Mad 493; *Chiragha v. Mahtaba* 79 P R 1898 The law allows the reversioner 12 years from the death of the widow, within which to bring his suit for possession, and it is not in the power either of the widow or of any person claiming through or against her to abbreviate that period or to substitute another period or starting point of time—*Cursondas v Vundravandas*, 14 Bom 482

If however, the right of the female heir had been barred by twelve years' adverse possession before the Act of 1871 came into force a reversioner suing after the Act of 1871 would also be barred because a cause of action already barred under the Act of 1859 cannot be revived by later Acts—*Braya v Jiban*, 26 Cal 285 (296), *Mohima v Gouri*, 2 C W. N. 162 (164), *Drobomoyee v Davis*, 14 Cal 323 (345), *Sham Lal v Amarendra*, 23 Cal 460 (471)

It has been held in some cases that where property, the estate in which has descended to a female heir, *never reaches her hands* but is held adversely to her by a stranger, the cause of action for a suit for the recovery of the property accrues at the commencement of the adverse possession by the stranger, and a suit to enforce that cause of action will be barred both against the female heir and against the reversioner after the expiration of the statutory period of limitation counting from the commencement of adverse possession, the stranger having after the expiration of that period acquired an absolute indefeasible title to the property Article 141 does not apply to the case—*Hanuman v Bhagaut*, 19 All 357 (371), *Gya Pershad v Heel Narain* 9 Cal 93 (95); *Ghandharap v. Lachman*, 10 All 485 (488), *Tika Ram v Shama Charan*, 20 All 42 (46) But in another Allahabad case, where a separated Hindu died in 1862 leaving a widow and daughter but no son, and the estate descended to the widow but possession *never reached her* as a nephew of her husband (who had then no title to the property) took possession of the property immediately on the death of the last holder, and retained possession for more than 12 years, and then after the death of the widow in 1887, the daughter (reversioner)

reversioners of the adopted son for possession of the alienated property, within twelve years after the death of the adopted son's widow, was held to be barred because the alienee had acquired a prescriptive title by adverse possession as against the adopted son and Art 141 did not apply to this suit—*Amrita v Jatindra* 32 Cal 165 (168) Article 141 applies where the last full owner was in possession at the time of his death. If he himself was dispossessed time would begin to run against him and the operation of the law of limitation will not be arrested by the fact that on his death he was succeeded by a female heir, e g, widow, daughter, or mother—*Mohendra v Shamsunnessa* 21 C L J 157 (164) 19 C. W. N 1280, *Pandurang v Basappa*, A I R 1923 Bom 364, *Ramayya v Kotamma* 45 Mad 370 (373) See also *Maharaja Kesho Prasad v Madho Prasad* 3 Pat 880 cited in Note 585 under Article 140

590 Decree against female—Effect on reversioners.—An adverse possession against the female heir does not affect the reversioners (see Note 589 above), but a decree passed adversely to the female heir binds the reversioners. Thus where a suit by a female heir to recover possession from a trespasser had been dismissed on the ground that it was barred by the defendant's adverse possession against her for 12 years, the decree so dismissing the suit was binding on the reversioner who brought a suit for possession after the death of the female. Article 141 did not apply and would not give the reversioner 12 years' time to sue after the female's death, because the plaintiff being bound by the decree against the female, he was not 'entitled to possession of any property' within the meaning of this Article—*Harsnath v Mothur Mohan* 21 Cal 2, at page 18 (P C) following the *Siva Ganga Case* 9 M I A 539. If a Hindu dies leaving a widow and a daughter, and an alienation being made by the widow the daughter brings a suit to set aside the alienation which is dismissed the adverse decree would, in the absence of fraud or collusion, be binding on the reversioner coming after the daughter's death—*Hanuman v Dhagauts*, 19 All 357 (374). An adverse decree in a suit brought by a Hindu widow for possession of a Zamindari as heir to her husband, if it had become final in her lifetime, would bind those claiming the Zamindari in succession to her, and unless it could be shown that there had not been a fair trial of the right in that suit or in other words, unless that decree could have been successfully impeached on some special ground it would have been an effectual bar to any new suit by any person claiming in succession to the widow—*Katams Nahar v Raja of Siva Ganga*, 9 M I A 539 (604)

But where a gift was made by the widow, and she brought a suit to set aside that gift on the ground that the conditions on which the gift had been made were not fulfilled by the donees, and that suit was dismissed, the decree in that suit was not binding on the reversioners, who could bring a suit to recover possession within 12 years after the widow's death.

runs from the date of the widow's death and not from the date of the transfer—*Sheikh Abdur Rahman v Shekh Wali Mahammad* 2 Pat 75 (80)

592 Suits not under this Article —A suit by the adopted son to recover property alienated by his adoptive mother before adoption is governed by Art 144 and not by this Article because he was not a person entitled to property on the death of a female but entitled to the property immediately from the date of his adoption—*Moro v Balaji* 19 Bom 809 (814)

Where succession vests jointly in two female heirs (e g two daughters) who make no partition of the property a suit by one on the death of the other to recover possession of the property cannot be said to be a suit under this Article because the plaintiff does not succeed to the deceased's interest by inheritance as reversionary heir but acquires the interest by survivorship. This Article contemplates inheritance not survivorship—*Sachindra v Rajani* 18 C W N 904 (906)

This Article does not apply where the plaintiff is not the nearest reversioner entitled to succeed to the property on the death of a female but is a reversioner next in succession to the nearest reversioner. Thus the last male owner died leaving a widow, and the widow improperly alienated a portion of the land but the nearest reversioner did not bring a suit to challenge the alienation after the widow's death and then died a suit was then brought by the reversioner next in succession to the deceased reversioner, for possession of the land alienated. Held that the suit did not fall under this Article but under Article 144—*Sundar v Sahg Ram* 26 P R 1911 9 Ind Cas 300

593 Starting point of limitation —The cause of action for a suit by the reversioners for possession of lands left by the last male owner and alienated by his widow accrues on the death of the widow and not on the date of the alienation—*Chiragha v Mahtaba* 79 P R 1838 *Pursat Koor v Palut Roy* 8 Cal 442 (445) See also 2 Pat 75 *supra*

The cause of action for the reversioner arises when the female dies. Where there are two widows of the last male holder and one of them dies the estate passes to the surviving widow and no cause of action accrues to the reversioner until the death of the surviving widow (even though the alienation was made by the other widow)—*Muthiyasa v Haradaguntis* 39 M L J 567 *Ram Dei v Abu Jafar*, 27 All 494 (498) *Mukta v Dada* 18 Dom 216 (220), *Cursondas v Sundravandas* 14 Dom 481

Similarly, where there are several daughters inheriting the father's estate on the death of one of them the survivors get the whole estate and no cause of action will accrue to the reversioners until all the daughters are dead.

If the reversioner comes in after successive female heirs (e g after the widow and daughter or after the widow and mother) his suit is in time

if brought within 12 years of the date of the death of the last female holder even though the alienation was made by the previous female holder. See *Kokilmoney v Manick* 11 Cal 79 *Sham Lal v Amarendra* 23 Cal 460 *Hanuman v Bhagauti* 19 All 357 Under this Article a suit may be brought within 12 years of the date of the death of the last female entitled to succession—*Pursut Koer v Palut Poy* 8 Cal 442 (445)

A widow alienated her husband's property in 1894 and in that year a suit was brought by the plaintiff's father to set aside the alienation but it was dismissed on the ground that he was not the nearest presumptive reversioner but one B. After the widow's death in 1897 B brought a suit in 1909 to recover possession of the property but the suit was dismissed in 1916 on the ground that he was not a reversioner at all as his alleged adoption was invalid. The plaintiff then filed a suit in 1919 for possession of the property as reversioner. Held that the suit having been filed more than 12 years after the widow's death was barred under this Article and the plaintiff had got no fresh cause of action in 1916 when it was found that B was not a reversioner at all. Once limitation had begun to run it could not be suspended. It can not be said that the plaintiff could not bring a suit until the judgment of 1916 was delivered—*Ranga Natha v Rama Pandithar* 44 M L J 87 A I R 1923 Mad 108 70 Ind Cas 446

Where a Hindu widow remarried in 1899 and transferred her first husband's property in 1913 and a suit was brought in 1913 by the reversioners of her first husband to recover the property held that the suit fell under Article 143 or 141 if Article 141 applied the cause of action for the plaintiff accrued not on the date of alienation but on the remarriage in 1899 as the widow incurred civil death so far as her first husband was concerned, by her remarriage and her subsequent possession was that of another person in the eye of law. The suit was therefore barred—*Nathu v Nai Bahu*, 11 N L R 86 29 Ind Cas 61*

If an alienation was made by the widow of the last male holder in 1857 and the plaintiff (who is the daughter's son of the last male holder) succeeded to the property in 1890 after the death of the last surviving daughter of the last male holder the suit is governed by the Act of 1877, and not by the Act of 1859 because the starting point of limitation is the death of the female (1890) which took place while the Act of 1877 was in force and not the date of alienation (1857). See *Hanuman v Bhagauti* 19 All 357 (365) *Sanbaswa v Raghava* 13 Mad 512

Effect of bar of limitation—If the nearest reversioner entitled to sue under this Article does not bring a suit within 12 years of the death of the female for possession of the property alienated by the female and then dies the reversioner next in succession to the deceased reversioner is not thereby barred but is entitled to bring a suit within 12 years from the death of the deceased reversioner. The possession of the defendant which was adverse to the deceased reversioner does not become adverse to the

present reversioner until he succeeds to the property—*Sundar v Sahg Ram* 26 P R 1911 (P B) 9 Ind Cas 300 *Malkharyun v Amrita* 42 Bom 714 (718)

594 **Presumption of death of female**—The plaintiff sued in 1911 as a reversioner to recover possession of property alienated by a Hindu widow who had disappeared in 1863 and was not heard of since 1870. The lower Court held that under sec 108 of the Evidence Act it would be presumed that the widow died at the time of the suit and that therefore the suit was within time. But the High Court held that it lay on the plaintiff to prove affirmatively that he had brought his suit within 12 years from the actual death of the widow and that no presumption would be drawn according to the terms of sec 108 Evidence Act—*Jayavant v Ram chandra* 40 Bom 239 (47). When the question is not merely of death but of death at a particular time there is no presumption as to the time but the party concerned to make out the death on a specified date must prove it by evidence—*Parsoo v Munnalai* 13 N L R 16 39 Ind Cas 21. See also *Venkata Rana Krishna v Briramulu* 46 M L J 541 (P C) where the entry in a *purusha* s book as to the date of the death of the widow was held to be unreliable.

But where it is known that a widow died in May 1902 but the exact date of the month is unknown and the plaintiff brought his suit on the 31st May 1914 held that the defendants were bound to prove that she died before the 31st of May 1902—*Tani v Pihla Ram* 1 Lah 551 (357)

142—For possession of Twelve The date of the dispossession or discontinuance of immovable property years when the plaintiff while in possession of the property, has been dispossessed or has discontinued the possession

Application of Article—The general rule of limitation in suits for recovery of property in cases where the plaintiff while in possession has been dispossessed or has discontinued possession is twelve years and if the defendants rely upon a shorter period of limitation under any special law, the burden lies upon them to establish the circumstances requisite to make the shorter term applicable. Thus where the tenants have been dispossessed by their landlord and bring a suit to recover the land within 12 years from the date of dispossession but the defendant (landlord) contends that the land being an occupancy holding the special period of two years limitation prescribed by Article 3 Sch III of the Bengal Tenancy Act applies held that it lies upon the defendant to establish

the occupancy character of the holding so as to bring the suit within the scope of the special rule of limitation—*Tara Nath v. Iswar Chandra*, 16 C. W. N. 305 (40).

595. "While in possession".—When a plaintiff's title is once established, his possession however obtained &c whether it is taken forcibly or not) would be possession within the meaning of this Article—*Protab Chandra v. Durga Charan* 9 C. W. N. 1061 (1064). Thus where the rightful owner of lands was dispossessed but succeeded in ousting the trespasser without recourse to law and continued in possession, such possession would be the possession of the owner within the meaning of this Article, and if the rightful owner is again afterwards dispossessed under a decree obtained by the trespasser under section 9 of the Specific Relief Act, the period of limitation for a suit by the rightful owner to recover possession would run from the date of the dispossession under the decree, and not from the date of the original dispossession. The interval between the time when the owner ousted the defendant and the time when the defendant recovered possession of the land under sec 9 of the Specific Relief Act should enure to the benefit of the owner and not of the trespasser—*Jonab v. Surya Kanta* 33 Cal. 821 (825); *Protab Chandra v. Durga Charan* 9 C. W. N. 1061 (1064). *Mumtazuddin v. Barkatula*, 2 C. L. J. 1, *Waziruddin v. Dost* 6 C. L. J. 472.

Possession is either actual or constructive. Where one co-sharer holds the share of another co-sharer who being absent had simply ceased to hold actual possession the holder's possession implies constructive possession by the real proprietor. While either kind of possession exists in the proprietor, time does not begin to run against him—*Shakunda Suraya v. Anam*, 29 P. R. 1910 5 Ind. Cas. 888.

596. Dispossession.—Dispossession implies the coming in of a person and driving out of another person from possession—*Rains v. Buxton* (1880) 14 Ch. D. 537 (539). *Brojendra v. Sarojini* 20 C. W. N. 481. *Panchoo v. Janeswar*, 32 C. L. J. 9, *Charu Chandra v. Nahush Chandra*, 50 Cal. 49 (63). Dispossession implies ouster, and the essence of ouster is that the person ousting is in actual occupation of the land. The mere finding that the plaintiffs are not in possession of the disputed land does not decide the question whether there was dispossession. The statute applies not to want of actual possession by the plaintiff but to cases where he has been out of, and another is in, possession of the lands for the prescribed time—*Smith v. Loyd*, 23 L. J. Exch. 191, *Sheikh Bahadur Ali v. Secretary of State* 2 P. L. T. 133.

If a proprietor who has been collecting rent from tenants is prevented from doing so because a rival proprietor has successfully invoked the aid of a Court of Justice, the injured proprietor is 'dispossessed' from his property just as if he had been driven out by physical force—*Amirulla v. Sadatulla* 26 Ind. Cas. 368, *Lala Sahu v. Ghunaria*, 2 Ind. Cas. 381.

Dispossession under a decree of the Court obtained under section 9 of the Specific Relief Act is dispossession within the meaning of this Article limitation runs against the true owner from the date of such dispossession—*Protap Chandra v Durga Charan* 9 C W N 1061 *Mam tazuddin v Barkatulla* ~ C L J 1 *Jonab v Surja Kanta* 33 Cal 821

Where the defendant gathers the fruits of mango trees clumed by the plaintiff that amounts to dispossession and a suit to recover possession must be brought within 12 years of the first of such acts—*Bap v Dhondi* 1891 P J 221

Where upon the occasion of a regular settlement the plaintiffs who were the proprietors of a land on which the rent free tenure had been resumed some years before declined to engage for the payment of the land revenue in consequence of which the Government made the engagement with the defendants who were put in possession of the land it was held that there was dispossession of the plaintiffs or discontinuance of possession by them within the meaning of this Article and that time began to run from the date of the defendants being put into possession—*Muhammad Amanulla v Badan Singh* 17 Cal 137 (142 143) P C

597 Encroachment by tenant —When a tenant takes possession of lands of his landlord outside his tenancy and professes to do so in his character as a tenant the landlord is dispossessed in a limited sense in other words he is deprived of actual or *khas* possession of the land but not of proprietary possession or possession by receipt of rent In such a case Art 142 would apply and the landlord if he wishes to eject the tenant must bring his suit within 12 years of the dispossession If he does not do so his title to recover actual possession would be barred but his right to proprietary possession & right to receive fair rent would not be lost because the possession of the tenant so far as the latter right is concerned has never been adverse—*Ishan v Ranvarjan* ~ C L J 125 If the tenant encroaches upon the lands of his landlord and claims that these lands are within his tenure and thus holds possession of those lands for more than 12 years the landlord's suit for ejectment is barred under Article 142 and the tenant by virtue of the statute of limitation acquires a right which entitles him to claim to hold the lands as a tenant of his landlord and to resist the landlord's claim for *khas* possession But the landlord's proprietary right is not lost because what has been asserted by the tenant is not that he has acquired by adverse possession an absolute interest but only a tenancy right in the property—*Gopal Krishna v Lakkiram* 16 C W N (34 (63)) *Rakho v Sudhram* 8 C L J 557 If however the tenant intends the encroachment for his own exclusive tenet and sets up a title adverse to the entire interest of the landlord the latter must bring a suit to eject the tenant as a trespasser If he fails to do so his right to the proprietary possession as well as to the actual possession would

both be barred—*Iskan v Ramranjan* 2 C. L. J. 125 *Ration v Sudhram*, 8 C. L. J. 55.

The nature and effect of the possession must depend upon the nature and extent of the rights asserted by the overt conduct or express declaration of the tenant. Consequently there can be no acquisition of an absolute title when it is found that the tenant has asserted nothing but a limited interest. Adverse possession of a limited interest though a good plea to a suit for ejectment is good only to the extent of that interest and not of the entire interest—*Iskan v Ramranjan* 2 C. L. J. 125 *Muthurakhoo v Orr*, 35 Mad. 618 (621). See Note 621A under Art 144.

An encroachment made by a tenant on the property of his landlord should not be presumed to have been made absolutely for his own benefit and as against the landlord but should be deemed to be added to the tenure and to form part thereof—*Esudas v Damodar* 16 Bom. 552 (558). The true presumption as to encroachments made by a tenant on the adjoining lands of his landlord is that the lands so encroached upon are added to the tenure and form part thereof *for the benefit of the tenant so long as the original holding continues, and afterwards for the benefit of his landlord*, unless it clearly appears by some act done at the time that the tenant made the encroachments for his own benefit—*per Markby J* in *Gooroo Dass v Ishwar Chandra*, 22 W. R. 246, *Muthurakhoo v Orr*, 35 Mad. 618 (621). But this view has been dissented from in later cases of the Calcutta High Court. Thus, in *Nuddyar Chand v Meajan*, 10 Cal. 820 (822) Garth C. J. says 'It would seem strange, if as a matter of law, a tenant were allowed without his landlord's permission to appropriate any land which adjoins his own tenure and then when his landlord complained of the trespass and required him to give the land up, he were allowed to take advantage of his own wrong and insist upon retaining possession of it until the expiration of his tenure'. In *Prokhad Teor v Kedar Naik*, 25 Cal. 302, it has been held that if a tenant encroaches upon the adjoining lands of his landlord, the landlord may if he chooses treat him as a tenant in respect of the land encroached upon, but the tenant has no right to compel the landlord against his will to accept him as a tenant in respect of that land. In another case Mookerjee J. observes, "An encroachment made by a tenant upon the adjoining waste land of his landlord, is *prima facie* made by him in his character as a tenant, but it is open to the landlord to repudiate the relation, to treat him as a trespasser and to evict him as such, on the other hand, it is open to the tenant to indicate at the time he encroaches that he intends to hold the encroached lands for his own exclusive benefit, and not to hold them as he held the lands to which they are adjacent, in this event the landlord, though willing to treat him as a tenant, may be driven, by an assertion of a hostile title, to a suit to eject him as a trespasser—*Iskan v Ram Ranjan*, 2 C. L. J. 125.

It has been held in some cases that the tenant's possession—

ed lands can only commence to be adverse when a title adverse to the land lord is asserted or when the landlord becomes aware of the encroachment in other words the tenant is bound to prove that he set up a right of tenancy to the encroached lands to the knowledge of his landlord—*Iskan v Ram ranyan* 2 C I J 15 *Hali Akried v Tola Meah* 31 Cal 397 (403) *Krishna Gobinda v Banku Behari* 13 C W N 698 But the Madras High Court holds that this rule is stated in too broad terms that the ordinary rule of law is that possession held by a person in his own right is adverse to the true owner whether the owner is aware of such possession being taken or not and that a tenant is not bound to prove that his encroachment was known to the landlord—*Muthurakkoo v Orr* 35 Mad 618 (622) At any rate where the tenants were cultivating the encroached lands for a considerable length of time (e g 30 years) the landlord's knowledge of the encroachment will be presumed—*Ibid*

598 Discontinuance of possession —Discontinuance refers to a case where the person in possession goes out and is succeeded in possession by another—*Brojendra v Abdul* 22 C I J 283 *Brojendra v Sarojini* 20 C W N 481 *Sheikh Sohnur v Huttman* 1 C W N 277 *Charu Chandra v Vahush Chandra* 50 Cal 49 (63) *Rains v Buxton* (1880) 14 Ch D 537 (539) The word discontinuance means an abandonment of possession followed by the actual possession of another person This I think must be its meaning for if no one succeeds to the possession vacated or abandoned there could be no one in whose favour or for whose protection the statute would operate To constitute discontinuance there must both be dereliction by the person who has the right and actual possession whether adverse or not to be protected Actual possession is the object of the statute and to apply its provisions to any other case would be to violate its plain meaning and policy —*per Blackburne J in McDonnell v McKinty* 10 Ir R 514 *Singh v Lloyd* 23 I J Fy 194 The principle is that the owner must be considered in point of law as always in possession so long as there is no intrusion The starting point for the limitation under Article 142 is the date of dispossession or discontinuance and not the date when the owner ceases to occupy the land—*Madan Mohan v Bray Behari* 5 P L J 592 (593 594) Therefore where it is found that the land in dispute is the property of the plaintiff that though the plaintiff under a mistake laid down certain boundary pillars leaving the land in dispute outside the boundary pillars no one entered into possession of the land so left out until within 12 years before the date of the institution of the present suit held that having regard to the nature of the land (which was jungle land) the possession should be held to have continued with the plaintiff until he was actually dispossessed and that there was no discontinuance of the plaintiff's possession on the date of his laying down the boundary pillars within the meaning of this Article—*Shriish S Anwar v Huttman* 1 C W N 277 (279)

In the absence of motive for abandonment and of the evidence of intention to abandon, a suit by the plaintiff for possession is not barred by Article 142—*Shahabul v Ganesh* 53 P R 1907 Thus mere non residence in a house owing to its being in a state of repair does not constitute discontinuance of possession of the house in the absence of an intention on the owner's part to give up possession—*Krishnammal v Pichannarayyan*, 7 M L J 186 The fact that the land is merely allowed to lie waste while the owner is in a distant place does not constitute discontinuance of possession—*Muhammad Yar v Ghulam*, 49 P R 1884, *Ramzan v Basharat*, 105 P. R 1901, *Narain v Billa*, 25 Ind Cas 82 But long absence and inaction may be evidence of abandonment—*Shahzada Suraya v Asim*, 29 P R 1910, *Nihal Singh v Dula Singh* 38 P R 1885

The mere failure to cultivate uncultivable land does not constitute abandonment—*Shahabul v Ganesh*, 53 P R 1907 The principle is that there can be no discontinuance by absence of use and enjoyment where the land is not capable of use and enjoyment—*Leigh v Jach*, (1879) L R. 5 Ex D 264 (274)

The mere fact that a mine has not been worked by the owner does not amount to discontinuance of possession—*Bengal Coal Co Ltd v Monoranjan* 22 C W N 441

A person by merely living outside the village cannot be said to have abandoned the site in the village in which he once had his residential house which had fallen down and had not been re built for many years Possession in case of such vacant site is presumed to go with title, and its mere use by a neighbour for the purpose of tethering his cattle thereon cannot be regarded as adverse possession—*Lachman Das v Narsingh Das* 101 P L R 1916 36 Ind Cas 207

The owner of a property who has accorded permissive occupation of the same to a person on the ground of charity or relationship cannot be said to have discontinued possession of the property, within the meaning of this Article, because under such circumstances the possession of the occupier is the possession of the owner—*Gobinda Lal v Debendranath*, 6 Cal 311 (315), where therefore the owner seeks to recover the premises so occupied, the suit does not fall under this Article but under Article 144, and limitation runs from the time when the occupation of the tenant becomes adverse to the owner—*Gobind Lal v Debendranath* 6 Cal 311, 314 (reversing on appeal *Gobind v. Debendranath* 5 Cal 679) Where the plaintiff's husband conveyed to her a house in 1898 in satisfaction of her dower, but continued to reside in the house as before till his death in 1911, whereupon the defendant (the son of the plaintiff's husband by another wife) took forcible possession of the house and then the plaintiff sued to recover possession, held that, having regard to the relationship, the possession of the plaintiff's husband from 1898 to 1911 was only permissive occupation and did not amount to dispossession—

possession of the plaintiff, and that consequently the plaintiff must be deemed to have held possession up to 1911—*Ibrahim v Isa Rasul* 41 Bom 5 (12)

Where on default of payment of Government revenue by a cosharer possession of his share was made over to another by Government on a farming lease which expired in 1871 but on the expiry of the lease the lessee still retained possession for over twelve years and the original owner or his representative made no claim during the period *Id est* that there was a discontinuance of possession by the original owner from 1871 within the meaning of this Article—*Madho v Surjan* 28 All 281 (.83)

599 Attachment by Magistrate —An attachment by the Magistrate under sec 146 Criminal Procedure Code does not amount to dispossession of the true owner from the property attached nor does it amount to a discontinuance of possession by the owner. Although the actual or physical possession is with the Magistrate it is merely a custody or detention on behalf of the true owner pending the decision of the Court of competent jurisdiction. The legal possession will during the attachment be with the true owner. Consequently a suit for declaration of title to the property attached is not a suit for possession under Article 142 or 144 but falls under Article 120—*Rajah of Venhatagiri v Isakapalli* 26 Mad 410 (413 415) (dissenting from *Goswami v Sri Girdhari* 20 All 120) *Panna Lal v Panchu* 49 Cal 344 *Profindra v Sarajini* 20 C W N 481

When property which is in dispute between two parties is attached and taken possession of by the Collector for the protection of the Government revenue it is his duty after crediting the Government revenue and paying the collection expenses to pay over the surplus of the rents collected to the real owner. And so long as the Collector retains possession his possession must be held to be on behalf of and not adverse to the real owner. Nor does the Collector's possession become one on behalf of the defendant simply because he afterwards delivers possession to the defendant in consequence of a decree—*Karan Singh v Bakar Ali Khan* 5 All 1 (6) (P C)

But if after attachment the Magistrate puts the defendant in possession of the property then of course there is actual dispossession of the plaintiff and a suit by the plaintiff against the defendant would be governed by this Article—*Nissarah v Adebuddi* 16 C W N 1073

600 Burden of proof —In a case falling under this Article the plaintiff must at the outset show that he had been in possession within twelve years before suit and cannot rest merely on a proof of title (while in cases falling under Art 144, the plaintiff may rest content with proof of title only and the burden lies on the defendants to show that they have had a possession inconsistent with the title of the plaintiff more than twelve years before suit)—*Faki v Babaji* 14 Bom 455 (461) *Ibrahim v Isa Rasul* 41 Bom 5 (11), *Mora Desai v Rama Chandra* 6 Bom 303 W 22

mohan v Molkura Mohan 7 Cal 225 *Udit Varan v Golab Chandra* 27 Cal 221 (P C) *Mohima Chunder v Mohesh Chunder* 16 Cal 473 (P C) *Gopaul v Nilmoney* 10 Cal 374 *Kashinath v Shridhar* 16 Bom 343 *Kuppuswami v Chockalinga* 49 M L J 788 *Innasimuthu v Upa harath* 23 Mad 10 (P C) *Ramayya v Kotamma* 45 Mad 370 (37) *Jafar Ali v Mashur* 14 All 193 *Haji Khan v Baldeo* 24 All 90 (93) *Komil Prasad v Bharat* 23 A L J 874 *Mirza Shan sher v Kunjbehari*, 12 C W N 773 *Asghar Raza v Mehdi* 20 Cal 560 (P C) *Mahomed Ali v Khaja Abdul* 9 Cal 744 750 (F B) *Rani Hemanta Kumari v Jagadindra* 10 C W N 630 (P C.) *Midnapore Zamindari Co v Panday* 2 P L J 506 *Dharani Kanta v Gabar As* 17 C W N 389 (P C) *Rakhai Chandra v Durgadas* 26 C W N 724 *Mashar Hussain v Behari* 28 All 760 *Muthia Chetty v Seena* 12 Bur L T 234, *Inder Lal v Ram Surat* 5 P L J 724 (728) *Shiva Prasad v Hira Singh* 6 P L J 478 (491 525) F B Where there is no evidence or no evidence of any value on behalf of the plaintiff as to his possession at any time during 12 years before suit the plaintiff's case will fail and in such case it is immaterial that the defendant's evidence is weak or if he offers no evidence—*Shiva Prasad v Hira Singh* 6 P L J 478 (525)

But the plaintiff need not prove actual user for in fact possession is not necessarily the same thing as actual user and if the land is of such a nature as to render it unfit for actual enjoyment in the usual modes (as for instance where the land was a narrow slip of unenclosed land adjoining a public lane and unsuitable for agriculture) it may be presumed that the possession of the plaintiff continued until the contrary is proved—*Inder Lal v Ram Surat* 5 P L J 724 The nature of the possession to be looked for and the evidence of its continuance must depend upon the character and condition of the land in dispute If the land is either permanently or temporarily incapable of actual enjoyment in any of the customary modes (residence or tillage or receipt of rent) as in the case of land covered with sand by inundation or jungle land it would be unreasonable to look for the same evidence of possession as in the case of a house or cultivated field All that can be required is that the plaintiff should show such acts of ownership as are natural under the existing condition of the land and in such case when he has done this his possession is presumed to continue as long as the state of the land remains unchanged unless he is shown to have been dispossessed—*Mahomed Ali v Khaja Abdul Gunny* 9 Cal 744 751 (F B) *Takur Singh v Bhogerao* 27 Cal 25 (28 29) *Rakhai Chandra v Durgadas* 26 C W N 724

Mere proof of symbolical possession is not sufficient in a case where the plaintiff ought to have been in actual possession as for instance where the land is not in the occupation of cultivating tenants In such a case the plaintiff cannot discharge his onus only by giving evidence of symbolical possession within 12 years before suit —*Raghunath v Koudha*

Bom. 932 (936), 24 Bom L R 499, 68 Ind. Cas 91, A. I. R 1922 Bom 2. In case of a bare site, symbolical possession obtained by the plaintiff is equivalent to actual possession. Therefore, where the plaintiff purchased a land, which was a bare site, in a Court sale in July 1902, and obtained symbolical possession through Court in October 1904, and he alleges that he was ousted therefrom in 1914 and he brought the present suit for possession in March 1916, it was held that the symbolical possession was equivalent to actual possession of the plaintiff, and the defendant could defeat his claim only by showing an adverse possession for more than twelve years—*Kaman v Umra*, 76 P R. 1918, 47 Ind. Cas 411.

In a case falling under Art 142, the defendant will not have to prove that his possession was adverse; the word 'adverse' does not occur in Article 142; the question under this Article is whether the plaintiff while in possession has been dispossessed or has discontinued the possession more than 12 years before suit—*Mahammad Amanulla v Badan*, 17 Cal 237, 143 (P C); *Gursahai v Chedi*, 27 O C 230, 79 Ind. Cas 964, 1 O W. N 38.

The plaintiff cannot, merely by proving possession at any period prior to 12 years before suit, shift the onus to the defendant—*Mahomed Ali & Hajia Abdul*, 9 Cal 744 (750) F B (dissenting from *Kolly Churn v Secretary of State*, 6 Cal 725) *Maharaja Keokur Singh v Nund Lal*, 8 M I A. 199 (220) *Suresh Chandra v Shili Kantha*, 51 Cal 661 29 C W N 637, A I R 1924 Cal 855. Even the fact that the defendant admits that the land in dispute once belonged to the plaintiff at some time or other (not necessarily within 12 years prior to suit) shift the onus on to the defendant of proving adverse possession—*Nashar Hussain v Behari Singh*, 28 All 765 (762).

If the plaintiff can prove that he was in possession within 12 years before suit, the burden lies on the defendants of proving a present title to the land in themselves, before they can succeed—*Sudama v. Kishor*, 102 P. R. 1879.

Where in a suit for ejectment, the record of rights raises a presumption in the plaintiff's favour, the onus is shifted to the defendant to establish affirmatively that the plaintiff has been out of possession for more than 12 years—*Sheikh Harkat v. Baniat*, 21 C. W. N. 175, 39 Ind Cas 356.

In a suit for possession of certain land as having accreted to plaintiff's village by alluvion, it lies on the plaintiff to prove both title and possession within 12 years. If the plaintiff's title is proved, he may succeed either by proving that the land in suit had accreted by alluvion within the limitation period; or the plaintiff may prove that although the land had accreted more than 12 years before suit, it had remained within the limitation period water or jungle land, in respect of which the presumption would

arise that possession followed title—*Habibulla v Lalia Prasad* 34 All 612 (614)

Where a vendee of immoveable property sues for possession his vendor not having been in possession at the time of sale it lies upon the plaintiff to shew that his vendor was in possession at some period within twelve years prior to the date of the sale—*Deba v Rohiagi* 28 All 479 (480) *Kash Nath v Shridhar* 16 Bom 343 (346) But see these cases commented on in Note 574 under Article 136

The quantum of evidence of possession which it will be necessary for the plaintiff to adduce will depend on the circumstances of each case. In some instances very slight evidence may be sufficient to shift the burden of proof on the defendant. Thus in dealing with the question of possession as between brothers and sisters in native families regard must be had to the conditions of life under which such families live and to the fact that in such families the management of the property of the family is, by reason of the seclusion of the female members ordinarily left in the hands of the male members. In the case of such families slight evidence of enjoyment of income arising from the property is sufficient *prima facie* proof of possession—*Inayat Husen v Ali Husen* 20 All 182 (185)

601 Presumption.—*Possession follows title*—If there are two persons in a field each asserting that the field is his and each doing some act in the assertion of the right to possession and if the question is which of these two is in actual possession I answer the person who has the title is in actual possession and the other person is a trespasser—per Lord Selborne in *Lowe v Telford* (1876) 1 A C 415 In a case falling under Article 142 the plaintiff will have to prove not only that he had a title to the land but that he was in possession within 12 years before the suit. It is not sufficient to enable the plaintiff to succeed in the suit merely to prove that at some date antecedent to a period of 12 years prior to the institution of the suit he had acquired some paper title to the land he must also prove that he was in possession within 12 years prior to the suit. Thus possession will be presumed from title under certain circumstances. Thus where the evidence of possession on behalf of the plaintiff and on behalf of the defendant as to the former's possession within 12 years before suit is strong and evenly balanced the presumption that possession goes with title will prevail—*Raja Shiva v Hira Singh* 6 P L J 478 (525) F B *Runjeet Ram v Goburdhan* 20 W R 25 (P C) *Fakira v Munshi Ramcharan* 35 Ind Cas 554 1 P L J 146 (148) *Dhirm Singh v Hur Pershad* 12 Cal 38 (40) *Nauab Bahadur v Gopi Nath* 13 C L J 625 6 Ind Cas 392 (397) *Thakur Singh v Bhogerao* 27 Cal 25(27) *Kastura v Rajkumar* 8 C W N 876 But if it is found that the evidence produced by both the plaintiff and the defendant as to possession is unworthy of credit the plaintiff's suit must fail in as much as the presumption which arises upon proof of title cannot be called in

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Where the land is of such character (e.g. vacant site, waste or jungle land or land under water) that proof of any act of possession in the usual modes is substantially impracticable, it will be presumed that possession follows title and the plaintiff may therefore give proof of title only; and the onus will be shifted upon the defendant to prove that he acquired the ownership by adverse possession—*Raja Shiva Prasad v Hira Singh*, 6 P L J 478 (525) F B *Rakkhal Chandra v Durgadas*, 26 C W N. 724, *Srinivasachariar v Ragava* 46 M L J 560, *Mahammad Sahib v. Tilokchand* 46 Bom 920 (924), 24 Bom L R 373, *Madnapore Zamindars Co v Panday*, 2 P L J 506 (509) *Mahomed Ali v Khair Abdul Gunny*, 9 Cal 744, 751 (F B) *Ganapati v Raghunath*, 33 Bom 712 (717), *Habibulla v Lalta Prasad*, 34 All 612 (614) If the property in dispute has, up to a short time before suit remained waste and unoccupied, it is not necessary for the plaintiff to prove acts of possession within 12 years of suit, he has only to prove *prima facie* title not extinguished by limitation and the possession will be presumed to follow title The onus will be shifted on to the defendant to prove when his possession became adverse—*Ramzan Ali v Daskarat Ali* 105 P R 1901, *Muhammad Yar v Ghulam* 49 P R 1884 *Naram Devi v Billa* 204 P. I R 1914 25 Ind Cas 82 Where the plaintiff purchased a shop and two open sites adjacent to it and sued to recover possession of the open sites alleging that he had been unlawfully dispossessed by the defendants, and the plaintiff's title to the open sites was proved held that in view of the position of the open sites with reference to the shop (of which the plaintiff was in possession) the presumption was that possession of the open sites followed title, even though the evidence of possession in regard to the open sites was equally unworthy of credit on both sides—*Mahammad Sahib v Tilokchand*, 46 Bom 920 (925), 24 Bom L. R 373

Where land is unenclosed, acts of ownership in one part may be presumed to be acts of ownership over the whole, unless there are circumstances rebutting that presumption It is not necessary that a person should use any definite portion of an unenclosed land in assertion of his ownership—*Ikbalas v Secretary of State*, 26 Bom 410 (417)

Where the land in dispute is uninhabited or uncultivated, and no acts of ownership or possession by any person have been exercised over it, it is often necessary for the purpose of deciding the question of limitation to rely upon slight evidence of possession and sometimes possession of

the adjoining land, coupled with evidence of title, such as grants or leases, and the Courts are justified in presuming under such circumstances that the party who has the title has also the possession—*Mohuna Chunder v Hurro Lal*, 3 Cal 768 (769 770)

In respect of jungle or hilly land, possession must be presumed to be with the person having title. This presumption, however, would cease to be operative after the land is cleared of jungle and brought under cultivation—*Mirza Shamsker v Munshi Kunj Behari* 12 C W N 273

Diluviated lands—Where lands are by natural causes placed wholly out of the reach of their owner, as in the case of *diluvion* by a river if the plaintiff (who is the true owner) shows his possession down to the time of the diluvion, his possession is presumed to continue as long as the lands continue to be submerged—*Mazhar v Bishari* 28 All 760 (762) *Mahomed Ali v Akoya Abdul Gunny*, 9 Cal 744 (751) F B *Gunga v Ashutosh*, 23 Cal 863 (866) *Kally Charan v Secretary of State* 6 Cal 725 *Mono Mohan v Motkura Mohan*, 7 Cal 225 *Basanta Kumar v Secretary of State* 44 Cal 838 (P C). Therefore in a suit for possession of alluvial lands which were diluviated more than 12 years before suit and were taken possession of by the defendant after reformation, if the plaintiff can prove possession till diluviation the burden of proving

Kumar v Asutosh 23 Cal 863 (866)

Where the plaintiff had an undoubted title to a certain land but the defendant had no such title and could prove adverse possession for only 10 years before suit *the land being under water* during the first two years of the 12 years immediately preceding the suit and no act of possession being proved by either party during the two years of the submersion of the land, *held* that there would be a presumption that possession followed title and that plaintiff's possession continued over the two years in question, i.e. the possession continued to a time within 12 years prior to the suit, which was therefore not barred—*Rajkumar v Govind*, 19 Cal 660, 674 (P C). If the plaintiff proves that after the land became submerged he exercised acts of ownership, as by letting out the *jalkar* or right of fishing to tenants, *held* that this was a very strong evidence that the land covered by water over which the right of fishing was enjoyed belonged to the plaintiff. Evidence of the ownership and enjoyment of the *jalkar*, in a small piece of water as in this case (and not in a case of a *jalkar* in a deep and navigable river) is evidence of title to the land covered by the water. In this case the plaintiff has proved his ownership by letting out the *jalkar* to tenants, and this was *prima facie* evidence of possession also—*Mohiny Mohan v Krishna Kishore*, 9 Cal 802 (804, 807). If it was proved that the plaintiff exercised acts

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to the suit, which was therefore not barred—*Rajkumar v Govind*, 19 Cal 660, 674 (P C) If the plaintiff proves that after the land became submerged he exercised acts of ownership, as by letting out the *jalkar* or right of fishing to tenants, *held* that this was a very strong evidence that the land covered by water over which the right of fishing was enjoyed belonged to the plaintiff. Evidence of the ownership and enjoyment of the *jalkar*, in a small piece of water as in this case (and not in a case of a *jalkar* in a deep and navigable river) is evidence of title to the land covered by the water. In this case the plaintiff has proved his ownership by letting out the *jalkar* to tenants, and this was *prima facie* evidence of possession also—*Mohini Mohan v Krishna Kishore*, 9 Cal 802 (804, 807). If it was proved that the plaintiff ~~exercised~~ acts

of ownership over the land when covered by water, and that when the land became dry it remained waste and did not become fit for cultivation until within six or seven years before suit, *held* that the Court might and ought to presume that the plaintiff's possession continued after the land became dry, until the contrary was shown—*Mohini Mohan v Krishno Kishore*, 9 Cal 802 (807). Where a suit is brought by the owner for recovery of possession of lands diluviated and reformed *in situ* more than 12 years after the alleged reformation it lies on the plaintiff to show that his possession continued after reformation to a period within 12 years before the institution of the suit. If he has not admittedly had any actual possession since the lands became submerged, the plaintiff, in order to prove possession may rely on the presumption that possession of the lawful owner continues as long as the land is incapable of actual possession, but if he relies upon this presumption he must prove that the land was incapable of actual possession within 12 years before suit—*Suresh Chandra v Shit Kanfa*, 51 Cal 669 28 C W N 637, 78 Ind Cas 679 A I R 1924 Cal 855.

If a trespasser takes possession of the land, and before he has acquired a title under the statute the land becomes submerged under water, the trespasser's possession does not continue during the period the land is under water. The dispossession by vis major (viz by flood) has the same effect as voluntary abandonment, so that the trespasser will be deemed to have abandoned possession and the rightful owner, on the abandonment, is in the same position in all respects as he was before the intrusion takes place. The true owner's possession remains and continues during the period of submergence and thereafter, and time runs against him only when another person on the reappearance and reformation of the land takes actual possession—*Secretary of State v Krishnomoni* 29 Cal 518 535 (P C), (overruling the opinion of Garth C J on this point in *Kally Charan v Secretary of State* 6 Cal 725), *Basanta Kumar v Secretary of State* 44 Cal 838 (872) P C. This is in accordance with the rule laid down by Lord Macnaghten in *Agnew Co v Sherriff*, (1888) L R 13 A C 793. If a person enters upon the land of another, and holds possession for a time, and then without having acquired a title under the statute, abandons possession, the rightful owner, on the abandonment, is in the same position in all respects as he was before the intrusion took place. The possession of the intruder, ineffectual for the purpose of transferring title, ceases upon its abandonment to be effectual for any purpose. It does not leave behind it any cloud on the title of the rightful owner, or any secret process at work for the possible benefit in time to come of some casual interloper or lucky vagrant.

Therefore, where a land belonging to the plaintiff became submerged under water again and again, and was held by the defendant during the

period of its reappearance, *held* that during the time the land was under water, it must be deemed to have been in possession of the plaintiff (the rightful owner). During the months the land was not under water, the defendant was actually in occupation of it, but as soon as it was again submerged, the plaintiff's possession was revived. Consequently there was every year a break in the continuity of the defendant's possession, which enured for the benefit of the plaintiff, and which prevented the defendant acquiring title by adverse possession—*Ram Nain v Deoki Missir*, 20 A L J 756, A I R 1923 All 75, 69 Ind Cas 912

602 Commencement of limitation.—In case of dispossession, limitation runs from the date of dispossession, if the plaintiff subsequently obtains possession under a decree obtained in the first Court and is again dispossessed by the decree being reversed on appeal, he does not get a fresh starting point from the date of dispossession upon reversal of the decree; the original dispossession in this case is the starting point of limitation—*Narayanan v Kannamma*, 28 Mad 338 (342). But in some Calcutta cases it has been held that if the rightful owner is dispossessed but succeeds in ousting the trespasser without recourse to law and continues in possession, and is subsequently dispossessed by the defendant under a decree obtained by the latter under section 9 of the Specific Relief Act, the period of limitation for a suit by the rightful owner to recover possession will run from the date of dispossession under the decree and not from the date of the original dispossession—*Protap Chandra v. Durga Charan*, 9 C W N 1061, *Mamtauddin v Barkatulla* 2 C L J 1, *Waziruddin v Deoki*, 6 C L J 472, *Jonab Ali v Surya Kanta*, 33 Cal 821. Similarly, the plaintiff was ousted from his lands by the defendants in 1905, and brought a suit under sec 9 of the Specific Relief Act which was decreed in 1906, and in execution of that decree the plaintiff got possession in 1907. The defendants then applied for review of the judgment in the Specific Relief Act case and ultimately the plaintiff's suit was dismissed in 1908. After this date the defendants again took possession of the lands by dispossessing the plaintiff, and the present suit was instituted in 1919 for recovery of the lands. *Held* that time ran not from the date of the plaintiff's original dispossession in 1905, but from the date of his subsequent dispossession in 1908. There can be no constructive possession of a wrongdoer during the time that he is actually not in possession, and the possession of the true owner, no matter how that possession is obtained, must be considered as rightful possession in law, and the period during which the true owner is in possession will enure to his benefit and not to that of his trespasser. Consequently, where the plaintiff being the rightful owner is kept out of possession for less than 12 years and then succeeds in regaining possession (no matter whether in execution of a decree in a possessory suit or in any other way), and then after a time is again dispossessed (no matter whether on reversal of that decree or in any other

way) and thereafter institutes a suit for recovery of possession he can base his suit treating the subsequent dispossession as his cause of action under this Article the period will not run from the date of the earlier dispossession—*Girish Chandra v Baikuntha* 81 Ind Cas 279 A I R 1925 Cal 770

603 Extinguishment of title —When the plaintiff sues for possession and alleges dispossession but fails to shew that he has brought his suit within 12 years of such dispossession there is an extinguishment of his title under section 28. Consequently no declaration of title in his favour can be made—*Dishumbhar v Aadiar Chaud* 18 C I J 601 72 Ind Cas 64 (65)

604 Tacking of adverse possession —Both under Articles 142 and 144 the defendant may tack the period of his adverse possession to the period of such possession held by a previous adverse possessor (provided the periods are continuous). But the distinction between the two Articles is that under Article 144 the succeeding adverse possessor must be one who claims through the preceding possessor and must not be an independent trespasser (see note 622 under Article 144 under heading Tacking of adverse possession) while under Article 142 adverse possession for over 12 years by several persons in succession even though they do not claim from one another bars the true owner. This is the view of the Madras High Court in *Ramayya v Kotamma* 45 Mad 370 (375) 42 M L J 319 67 Ind Cas 246 A I R 1922 Mad 39. As observed by Kay L J in *Hillis v Earl Howe* [1903] 2 Ch 515. It was suggested by the Counsel in reply that if a series of occupiers not claiming under one another kept out the real owner for 100 years time would only run against him from the moment when the last of such occupiers entered into possession. I am of opinion that this is not the law. A continuous adverse possession for the statutory period though by a succession of persons not claiming under one another does in my opinion bar the true owner. The law has also been stated by Dart in his *Lenders and Purchasers* (7th Edn) Vol I page 471. In order that the title of the true owner may be barred by the adverse possession of a trespasser or a series of trespassers the possession by them must be continuous and so long as it is continuous it is immaterial whether they claim through one another or independently. A similar view has been taken in the English case of *Doe v Barnard* (1841) 13 Q B 915 181 J Q B 306. In this case the owner of a house was dispossessed and the dispossessor remained in possession till his death for less than 12 years thereupon his widow who had been living with him in the same house took possession and remained in possession for less than 12 years but the aggregate period of possession of the husband and widow was more than 12 years. It was held that the true owner was barred by the successive possession of the husband and widow for more than 12 years although the widow did not claim from or through her

husband as heirress or legatee or otherwise. So also, U N Mitra in his *Law of Limitation*, p 1160 observes "The question of limitation under Article 142 does not depend on continuous possession for 12 years by the defendant, but on the fact that more than 12 years have elapsed since the plaintiff was dispossessed or discontinued the possession. The last of several successive but *independent* trespassers may, therefore, defeat the plaintiff's suit, although he himself has been in possession for only a few days before the suit. This view of Mr Mitra is based on the decision of *Wallis v Fa House* (cited *supra*). But Mr Rustomji is of opinion that no distinction should be made between Articles 142 and 144 and that the same rule is applicable to both articles. 'Even under Article 142 possession of independent (though successive) trespassers cannot be tacked, in as much as immediately upon the cessation of possession by one trespasser, the rightful owner is (in point of law) restored to possession, and the entry of another trespasser is tantamount in law to a *fresh* dispossession of the owner, and the latter has accordingly 12 years under Article 142 reckoned from such constructive *fresh* dispossession'—Rustomji's *Limitation* 3rd Edn p 646 and the learned author has supported his statement by the decision in *Solling v Broughton* [1893] A C 556. Mr Starling is also of the same opinion because he observes that 'the case of *Wallis v House* is based upon the construction of the English Limitation Act (3 & 4 Wm IV C 27) and it is not quite clear whether the Legislature in India intended to reproduce in Articles 142 and 144 the law existing in England. The only question for the Courts in India to consider is whether one trespasser dispossessing another can be said to derive his right to sue or the liability to be sued from that other trespasser (according to the definition of plaintiff and defendant).—Starling 5th Flin., p 410. The Calcutta High Court is also of opinion that even under Article 142, one trespasser cannot add to his own possession the previous independent possession of another trespasser. When the possession passes from the first to the second trespasser, there is a constructive restoration, even if a momentary restoration, of the true owner's title to possession.—*Janaki Nath v Baikuntha Nath* 36 C L J 140, A I R 1922 Cal 176. The same view has been taken by the Rangoon High Court in *Mu Ali v Hadji Mahomed*, 1 Rang 176, 75 Ind Cas 31, A I R 1923 Rang 261.

If the period of possession by successive trespassers is *not continuous*, the continuous running of time in favour of the trespassers is stopped, as soon as there is an interval. As Dart observes. If a period of time should elapse, however short, after the abandonment of one trespasser who has not been in possession for the full statutory period and the entry of another, the title of the true owner is, as from the time of such abandonment, restored to him without any entry or act done on his part, for the does not apply to a case of want of actual possession by the true owner but only to cases where the owner is out of possession and

possession for the prescribed time"—*Vendors and Purchasers*, p 474 See also the observation of Lord Macnaghten in *Agelley Co v Short*, cited at p 552 *ante*.

605 Suits under this Article.—Where a non-occupancy raiyat has been dispossessed of his holding either by a trespasser or by the landlord otherwise than in execution of a decree, then if his tenancy has not yet been determined, he has a *title* in him viz the title of a tenant, and a suit by the raiyat to recover possession by establishment of his *title* is not a suit under section 9 of the Specific Relief Act, consequently Article 3 cannot apply but either Article 120 or 142—*Tamizuddin v Ashrub Ali* 31 Cal 647, 651 I B (overruling *Bhagabats v Lu'on Mandal*, 7 C W N, 218)

A suit by a minor on attaining majority to set aside a mortgage by conditional sale made by a *de facto* guardian, and for possession, is governed by this Article, not Art 91 because the setting aside of the deed of conditional sale is subservient to the claim for possession, and the suit must be treated as one for the recovery of immoveable property—*Ramansur v Raghubar*, 5 All 490 (491)

A suit to recover property by setting aside a void deed of transfer, which does not require to be set aside or cancelled, is governed by this Article, and not by Art 91—*Banku Behari v Krishna Gobinda*, 30 Cal 433 (438)

A suit by the landlord against the purchaser of a permanent tenure from a tenant, who has forfeited his tenancy by breach of a covenant in the lease whereby the landlord was entitled to re-enter in case the lessee transferred his interest by sale, gift or otherwise, is governed by this Article and not by Art 1, Sch III of the Bengal Tenancy Act, because the tenancy being forfeited the purchaser in this case cannot be called a tenant under sec 155 of that Act but is merely a trespasser—*Dwarkanath v Malkura*, 41 C W N 117, 31 Ind Cas 833 (837)

Where a Municipality pulled down a structure erected by the plaintiff on his own ground, which the Municipality claimed as part of the public road a suit by the plaintiff to recover possession of the ground is governed by this Article and not by Article 32 (which refers only to suits for damages for trespass, and not to suits to recover possession from a trespasser) and must be brought within 12 years from the time the structure was pulled down—*Joharmal v Municipality of Ahmednagar*, 6 All 180 (181)

When a suit is filed to eject the defendants from a house which the plaintiff claims as his own, and the defendants claim the house as the tenants of the plaintiff, the suit is governed by the title of the plaintiff as landlord, and not by the title of the defendants as tenants of the plaintiff, because the suit is for the recovery of the house and not under Art 141—*Gur Sahai v Jhansi*, 11 All 100 (101) 11 C W N 42

A suit by a purchaser of immovable property alleging that the defendant has dispossessed the plaintiff's vendor is governed by this Article—*Kuppusami v Chockalinga* 49 M L J 88 A I R 1926 Mad 181 *Deba v Rohitagi* 28 All 479 *Kashinath v Shridhar* 16 Bom 343 But Art 136 might have been applied

This Article has no application to a case where the plaintiff has been excluded from a joint family property Art 127 (which is more specific) applies to such a case—*Umesh Chandra v Jagadis Chandra* 1 C W N 543 (511)

143—Like suit, when	Twelve	When the forfeiture is
the plaintiff has become	years	incurred or the con-
entitled by reason of		dition is broken
any forfeiture or		
breach of condition		

606 Scope.—This Article applies only to those cases where the landlord is entitled according to the terms of the tenancy to take khas possession as soon as a breach of condition occurs that is where it is expressly stipulated in the contract of tenancy that if the tenant breaks any condition of the tenancy the landlord will be entitled to eject him. In other words this Article applies only where the suit for possession is based on a breach of contract. If however there is no express stipulation in the contract of tenancy for ejectment and khas possession in case any breach of condition occurs a suit by the landlord for ejectment of the tenant for breach of a condition is a suit based on tort and not on breach of contract and this Article cannot apply because it cannot be said that the landlord has become entitled to possession by reason of a breach of condition within the meaning of this Article. In fact in such a case the landlord will not be primarily entitled to eject the tenant his primary relief will be an injunction calling upon the tenant to make good the breach of condition and to pay damages to the landlord and the landlord can pray by way of secondary relief only that if the tenant fails to comply with the injunction the Court may award khas possession to him. See *Sharoop v Joggeswar* 26 Cal 564 (at p 568) where the law is however, very briefly stated. Thus where the landlord is entitled to possession, not on breach of condition of the tenancy but upon non compliance by the defendant with the order of the Court as to filling up a tank and making compensation the suit is framed in tort, and not on breach of any contract and Article 31 and not 143, applies—*Sharoop v Joggeswar* (supra)

This Article does not apply where the relationship of landlord and tenant does not exist and has never existed between the parties. Thus in 1894 the plaintiff sued the defendants for arrears of rent, the defendant

denied the relationship of landlord and tenant and the suit was eventually dismissed in 1895 on the ground that the relationship had not been established. A suit for recovery of possession was then brought after 12 years. *Held* that Article 143 did not apply because the relationship of landlord and tenant did not exist between the plaintiff and the defendant that Article 144 applied and as the defendant had been in possession for more than 12 years before suit and as the circumstances of his possession made it manifest that it was adverse the suit was barred.—*Bhairab Chandra v Kadam Bena* 18 C L J 553 27 Ind Cas 28 (30)

607 Forfeiture.—A permanent tenant forfeits his rights and his possession becomes adverse from the date he denies his landlord's title (*e.g.* by making an alienation and denying the landlord's title as owner in the deed of alienation) and consequently a suit for possession brought by the landlord 12 years after the date of denial (*viz.* the date of the alienation) is barred by this Article.—*Locha Ram v Jhinduradda* 76 P L R 1917 36 Ind Cas 565 (567). But it is open to the landlord to condone the first forfeiture and afterwards to bring a suit within 12 years from the time when another separate and distinct act occasioning forfeiture has occurred.—*Locha Ram v Jhinduradda* 141 P L R 1916 35 Ind Cas 235. In case of successive forfeiture the fact that the landlord did not exercise his right of enforcing one forfeiture does not bar him from enforcing a subsequent forfeiture or raise any estoppel against him.—*Zanarin of Calicut v Samu Vair* 38 M L J 775 35 Ind Cas 380 (382).

Certain lands in Malabar were demised on *anikka* tenure and some of them were alienated by the tenant. More than 12 years after alienation the landlord sued to eject the tenant on the ground that the defendant had alienated his right over the property contrary to the terms of his holding and had thereby forfeited the tenancy. *Held* that assuming that the rights under the demise were forfeited by the alienation the suit was barred under this Article.—*Mada an v Alhi Vangiyar* 15 Mal 123 (124).

A Hindu widow entered into a *souanamah* with her deceased husband's cousin which provided that she would remain in possession for life of a share of the family property that she would have no power to alienate and that after her death her share was to belong to the cousin. The widow sold this share and a suit was brought by the cousin's heirs to recover the property more than 12 years after the sale but less than 12 years after the widow's death. It was held that the terms of the *souanamah* prohibited only an alienation in perpetuity *e.g.* such an alienation by the widow as would prevent the cousin's succeeding after her death, but here the alienation was made only for the widow's lifetime and was perfectly good for her life time and as there was nothing in the words used in the *souanamah* attaching forfeiture to the alienation Article 143

did not apply (but Art 141) and the suit was not barred—*Bibi Sakhdra v Rai Jarg* 8 Cal 224, 229 (P C)

Where a *wajib ul aza* provided that if a resident left the village to settle elsewhere he would not be entitled to cultivation and possession and a hereditary occupancy tenant went away from the village and settled in another place leaving his fields in charge of another person held that the abandonment by the tenant of his residence in the village and his settling elsewhere involved a forfeiture of the tenure and a suit by the proprietors of the village to resume possession of the land of the tenant must be brought within 12 years from the time when the forfeiture was incurred—*Dhian Singh v Mehan Singh* 180 P R 1883

The starting point of limitation is the forfeiture itself and not when the lessor comes to know of the forfeiture. There is nothing in this Article about the knowledge of the lessor—*Zamorin of Calicut v Samu Nair* 38 M L J 275 A I R 1922 Mad 20 55 Ind Cas 380 (385) *Locha Ram v Jirdcaddis* 76 P L R 1917 36 Ind Cas 565 (567)

608 Breach of condition—A lease provided that the lessee was to enjoy the land from generation to generation for purposes of residence without any power of alienation and that in the event of such alienation the lessor would be entitled to his possession. The lessee sold the land and the lessor sued to recover possession. Held that this Article applied and time ran from the date of alienation and not from the date when the lessee surrendered possession to the transferee—*Musal v Chandra Kumar*, 24 C W N 1064 60 Ind Cas 312 (314)

Where it was stipulated in a lease that the tenant should clear a defined area in a certain time, on failure of which he would be liable to ejectment, the cause of action for a suit for ejectment accrued when the defendant did not clear the area by the time specified—*Tumeerooddeen v Meer Surwar*, 7 W R 209

Where a lease granted for the reclamation of certain jungle lands provided that the lessee should hold the land rent free for six years and that in the 7th year he should cause the lands to be measured and that on settlement of rent made with respect to the reclaimed lands and that on failure to do so the lessor would be entitled to possession a suit by the lessor to eject the lessee on breach of the above conditions was governed by this Article and not by Art 139—*Gooki Sheik v Mathewson* 11 C W N 661 (662)

Although a suit by the landlord to recover possession from a tenant on the ground of breach of condition may be barred still if the tenant does not in the written statement deny his tenancy under the plaintiff and does not deny his liability to pay rent to the plaintiff the landlord's suit to recover rent from the tenant is not barred—*Gooki v Mathewson*, 11 C W N 661 (663)

The purchasers of certain land agreed to pay the vendors certain sum

annually in respect of such land and further agreed that in default of payment the vendors should be entitled to the proprietary possession of a certain quantity of such land. The purchasers never paid the fees and more than 12 years after the first default the vendors sued them for possession of the land they were entitled to. It was held that the suit was governed by this Article and as more than 12 years had expired from the first breach of such agreement it was barred by limitation.—*Bhojraj v Gulshan* 4 All 493 (496)

Where a mortgagee is entitled to get the possession of land on the first instalment of the mortgage money not being paid a suit for possession of the land upon such non payment falls under this Article and time runs from the date when that instalment ought to have been paid.—*Nathu v Arishna* 1876 P J 4

Where the parties to a deed of exchange expressly covenanted that in the event of any dispute arising in the matter of enjoyment of the property exchanged each should return to the other what is taken and the plaintiff was dispossessed of the lands given by the defendants a suit based on the covenant is governed by this Article and not by Art 113.—*Srinivasa v Johnsa Routhier* 42 Mad 690 (691)

A exchanged certain properties with B and obtained certain lands from B in exchange and then C (a third party claiming a paramount title) brought a suit against A to recover the lands obtained by A in exchange from B and got a decree. A then brought a suit against B to recover the lands got by B from A. He'll that the suit was governed by this Article as the deprivation of the property constituted a breach of the statutory condition under sec 119 of the Transfer of Property Act and time ran from the date of the final appellate decree in the suit brought by C against A.—*Pajagopalam v Somasundara* 30 Mad 316 (318 319)

144—For possession of	Twelve	When the possession of
immoveable property	years	the defendant becomes
or any interest therein		adverse to the plaintiff
not hereby otherwise		specially provided for.

609 Scope.—This is a residuary Article relating to suits for possession and is to be applied only when there is no other Article in the Schedule specially providing for the case and if a suit be otherwise specially provided for the defendants plea of adverse possession for whatever length of time is perfectly immaterial for the purpose of limitation.—*Sekamma v Chikaya* 25 Mad 507 (510) *Mahammad Amannulla v Hadan Singh* 17 Cal 137 (143) P C *Kannusami v Mutlusami* 5 L. W. 250 *Seika Naidu v Periakumari* 44 Mad 951 *Tokhpal v Bishan Singh* 20 All 115 (117)

Thus Article refers to suits for possession of immoveable property that is it applies to cases where the plaintiff is out of possession and seeks to recover possession. But where the plaintiff is already in possession and asks for a declaration of his right to possession the suit does not fall under this Article but under Article 120—*Legge v Rambaran* 20 All 35 (F B) *Rajan v Monaram* 23 C W N 883

610 Art 142 and Art 144.—Article 142 is restricted to suits which are in terms and substance based on plaintiff's *pr* or *possession* which has been lost by dispossession or discontinuance. If there is no allegation of original possession in the plaintiff lost by dispossession or discontinuance of possession Article 142 cannot apply but the suit falls under Article 144—*Varudeo v Eknath* 35 Bom 79 (90) *Faki v Babaji* 14 Bom 458 (461) *Ram Lakhan v Gajadhar* 33 All 224 (228) *Bibi Sahodra v Rn Jan Bahadur* 8 Cal 224 (229) P C *Subappa v Venkappa* 39 Bom 335 *Goviuda v Md Esoof Sahib* 21 L W 398 A I R 1925 Mad 834 *Sifarani v Rajaram* 48 Ind Cas 230 (Nag) *Singuri v Gambhirji* A I R 1925 Nag 370

Where the plaintiff does not plead dispossession and it is not found that he was actually dispossessed on a certain date the suit falls under Article 144 and not under Article 142—*Ali Hamma v Ghurpattar* 47 All 389 A I R 1925 All 454 85 Ind Cas 578. Article 142 applies to a case where the plaintiff while in possession has been dispossessed or has discontinued possession. Where the plaintiffs had *never been in possession* but the original owner was admittedly in possession up to the time of his death and the plaintiffs derived their title from the will of the original owner and sought to recover possession on the strength of the will Article 142 could not apply but Article 144—*Charu Chandra v Nalush Chandra* 50 Cal 49 (64)

Art 144 is wider in scope than Art 142 the latter refers to suits for immoveable property the former includes in addition interest in immoveable property—*Lokenath v Jahanla Bibi* 14 C L J 572 12 Ind Cas 305 (307)

In a case falling under Article 142 adverse possession is not required to be proved in order to maintain a defence but in a case under Article 144 the defendant must show that his possession was adverse—*Md Amanulla v Badan Singh* 17 Cal 137 113 (P C)

611 Interest in immoveable property.—The following are interests in immoveable property—

(1) An equity of redemption in a mortgaged property—*Casborne v Scarfe* 1 Atk 603 *Parashram v Govind* 21 Bom 226 *Kanti Ram v Kalubuddin* 22 Cal 33 *Umesh v Zahir* 18 Cal 164

(2) A *toda giras hak* is a right to receive an annual payment a village—*Fulthasan v Desai* 22 W R 178 (P C)

(3) An annuity granted by a Hindu sovereign to a Hindu temple—*Collector v Krishnanath* 5 Bom 322

(4) A right to officiate as priest at funeral ceremonies to Hindus—*Raghoo v Kassy* 10 Cal 73

(5) A right to take fruits of one's own trees—*Rafu v Dhondi* 11 Bom 353

(6) The right to an office in a temple and endowments attached thereto—*Alagirisami v Sundareswara* 21 Mad 278 (187)

(7) A right to possession and management of a *sarajam*—*Narayan v Vasud* 13 Bom 247

(8) A Hindu widow's life interest in the income of her husband's immovable property—*Nathu v Dhunbaji* 23 Bom 1

(9) A right to collect dues from a fair on a piece of land—*Sikardar v Bahadur* 27 All 472

(10) A right to collect *lac* from trees—*Parmansard v Birkhu* 3 V L R 21

(11) An exclusive right (i.e. excluding the owner) to catch fish in the tank of another is an interest in immovable property and can be acquired by 12 years' enjoyment but a right to catch fish not excluding the rightful owner is not an interest in immovable property but a *droit de prendre* and therefore an easement and can be acquired by 20 years' use—*Hill & Co v Sheoraj* 1 Pat 674 67 Ind Cas 954 *In khimoi v Anura* 3 C I R 500 *Baker Hosiain v Ranjit Kuer* 2 P I J 287 *Jethmal v Jahanis Bili* 11 C I J 572 *Sitaram v Prita* 14 V I R 73 *Parbh v V Malho* 3 Cal 276

(12) The right to *parjot churas* and *charjal dues*—*Sheoraj v D's Bask* 21 O C. 119

(13) The mortgage of the superstructure of a house exclusive of the land beneath creates an interest in immovable property as the apparent intention is to mortgage the house and not merely the materials—*Narayan v Ramaswamy* 8 M H C R 100

The following are not interests in immovable property—

(1) A right to be placed on the register of revenue records—*Datta v Pandu* 19 Bom 43

(2) An agreement to grant a lease does not create an interest in immovable property nor is a suit upon the agreement a suit for the recovery of an interest in immovable property—*Lalla Ram v Chetale* 22 W R 287

(3) A claim to recover revenue from the holder of a land is not a claim to recover possession of an interest in immovable property—*Musli v Pankh* 16 M'd 115

(4) A right to take water from the well of another is not an interest in immovable property and cannot be lost by 12 years' adverse possession—*Ananda v Cane* 45 Bom 83

(5) A right to worship an idol—*Eshan v Monumshini* 4 Cal 683 (695)

(6) A suit to recover a certain sum of money due as an emolument of an hereditary office attached to a temple is not a suit to recover an interest in immoveable property—*Rathna Mudaliar v Tirutankata*, 22 Mad 357 (352)

612 Adverse possession.—The classical definition of adverse possession is to be found in the following oft-quoted words of Markby J. "By adverse possession I understand to be meant possession by a person holding the land on his own behalf, or on behalf of some person other than the true owner the true owner having a right to immediate possession. If by this adverse possession the statute is set running and it continues to run for twelve years then the title of the true owner is extinguished, and the person in possession becomes the owner"—*Bejoy Chandra v Kally Prosanno*, 4 Cal 327 (329) [It should be noticed that there is a misprint in the report of the judgment at p 329, the words "or on behalf" being omitted. See this passage correctly cited in 30 All 119, at p 122] In order to constitute adverse possession, there must be actual possession of a person claiming as of right by himself or by persons deriving title from him—*Secretary of State v Krishnamoni*, 29 Cal 518, 535 (P. C.) There must be proof of the defendant being in possession. Where the mortgagee was in actual possession of certain property under a usufructuary mortgage, and certain persons merely got their names recorded in the Revenue-papers in place of the name of the mortgagor, it was held that such persons could not acquire adverse possession of the right to redeem because they were not in actual possession of the property—*Kunwar Sen v Darbari*, 38 All 411 (414, 415) Evidence of possession on paper (leases and documents of various kinds) is not sufficient—*Radhamoni v Collector*, 27 Cal 943 949 (P. C.) The doctrine of *constructive* possession cannot be applied in favour of a wrongdoer, whose possession must be confined to *actual* possession, that is to say, if he relies on adverse possession he can succeed only as regards the portion of the land in suit of which he proves *actual* possession for the statutory period—*Nawab Bahadur v Gopinath*, 13 C L J 625 6 Ind Cas 392 (397). *Ananda Hari v Secretary of State*, 3 C L J 316, *Jogendra v Baladeo*, 35 Cal 961 *Mirza Shamsher v Munshi Kunj Behari*, 12 C W N 273

To prove title to the land by adverse possession, it is not sufficient to show that some acts of possession have been done. The possession required must be adequate in continuity, in publicity and in extent to show that it is adverse to the owner. Possession which does not cover the whole period and applies to small portions of the land is not sufficient—*Radhamoni v Collector of Khulna* 27 Cal 943, 950 (P. C.) *Jogendra v Baladeo*, 35 Cal 961 (971), *Jagjivandas v Bai Am* Bom 362 (366), *Wali Ahmed v Tola Meah* 31 Cal 397 (405) *v Kunharankutty*, 44 Mad 883, 890 (P. C.), *Vithaldas v* "

26 Bom 410 (416) In other words the possession must be actual visible exclusive hostile and continued during the time necessary to create a bar under the statute of limitations—*Jogendra v Balad o* (supra) *Narain Bahadur v Gopinath* 13 C L J 65 6 Ind Cas 30* (307) The possession in order that it may bar the recovery must be continuous and uninterrupted as well as open notorious actual exclusive and adverse—*Armstrong v Mowll* (1851) 14 Wallace 145 *Desiret v Delamar* 1 (1857) 10 Howard 3* In order to constitute adverse possession It must be a complete possession exclusive of the possession of any other person—per Cairns L. C in *Lees v Telford* (1876) 1 A C 415 (423) Therefore evidence of partial possession on the part of the plaintiff is sufficient to displace the adverse possession set up by the defendant—*Iskandar v Secretary of State* 26 Bom 410 (416) “To constitute dispossession there must in every case be positive acts which can be referred only to the intention of obtaining exclusive control—Pollock on Possession p 85 Therefore promiscuous acts done at different times by an unlearned and fluctuating body of persons from the village and the neighbouring villages cannot be said to be acts done with the intention of obtaining exclusive control over the lands and do not amount to adverse possession—*Md's Ahmed v To'a Meah* 31 Cal 307 (403) *Lutimool v Saibulla* 9 Cal 608 Plaintiffs obtained leave to plant trees on land belonging to Government and the only right they were entitled to was to get the fallen dry wood from the trees. Certain transfers of the village took place and on two occasions once in 1900 and at another time in 1910 the defendant who purchased the village got the proceeds of the sale of such wood. The plaintiffs on both occasions asserted their claim to the wood or to the price thereof but were unsuccessful. They then instituted this action within six years of the last sale for a declaration of their right to get the dry wood. The defendant pleaded adverse possession. It was held that the right being one which has only occasional that is which could be exercised at uncertain occasions when the wood might fall or be cut down from the trees and not being uninterrupted or continuing every year or at stated times and there being disputes between the parties as to the right on two previous occasions it could not be said that the defendant had acquired a title by adverse possession—*Dad Prasad v Dadi Prasad* 40 All 421 (423) No title by adverse possession can be presumed from a few acts of trespass committed only occasionally—*Kedar Nath v Anril* A I R 1923 Pat 329

If during the continuance of possession the defendant before he has completed 12 years is ousted from the land by a decree obtained against him by a third person which however is subsequently reversed and the defendant recovers possession such erroneous decree would not prejudice the defendant and the wrongful possession given to the third person by such decree would not prevent the continuous running of time against the

plaintiff and in favour of the defendant—*Dagdu v. Kahu* 27 Bom 733 (736)

But if during the continuance of adverse possession and before he has completed the 12 years the defendant voluntarily abandons the land the rightful owner is in the same position in all respects as he was before he intrus on took place—*Secretary of State v. Krishnamoni* 9 Cal 18 535 (P C) following *Ager v. Co v. Skott* (1888) L R 13 A C 793 if the defendant's possession comes to an end by *vis ins* or (e.g. submergence of land) it has the same effect as voluntary abandonment—*Ibid* (at p. 35) *Ma-har Hussain v. Behari Singh* 8 All 160 (162)

But the judgment of a Court declaring that a party in possession of immoveable property has no title to it has not the effect of interrupting the continuity of his adverse possession as against the real owner if the party continues in possession in spite of that judgment and his possession remains undisturbed. The judgment rather appears to emphasize the diverseness of the possession of the trespasser as against the real owner *Singararlu v. Chokkalinga* 46 Mad 525 527 (dissenting from *Mir Akbar Ali v. Abdul Aziz* 44 Bom 934) *Shah Nulbool Ali v. Shah Ajid Hussain* 25 W R 249 *Raghunath v. Tirumengada* 9 M L T 1 *Ayissa v. Lakshmana* 9 M L T 410 *Akbar v. Tabu* 45 P R 114 112 Ind Cas 805 *Hans Raj v. Maulu* 63 Ind Cas 881 882 (Lab) but the Bombay High Court is of opinion that such a decree puts an end to the adverse possession of the party in possession and he must if he wishes to acquire a good title by adverse possession start afresh after the decree—*Mir Akbar Ali v. Abdul Aziz* 44 Bom 934 (938)

It is sufficient to constitute adverse possession that the person claiming to be the real owner should have stood by while others continued to possess not by any derivative title but in practical contravention of his legal rights. The law does not require that the claimant to ownership must in such circumstances have protested against the violation of his rights and that the possession went on despite such protest—*Arumalaiam v. Venkatchalapathi* 43 Mad 253 269 (P C)

Acts indicative of adverse possession must vary according to the nature of the property over which possession is exercised. Thus in case of arable or waste lands the cutting of grass and the grazing of cattle are ordinary acts by which possession is asserted—*Wahid Ahmed v. Totah* 31 Cal 397 (405). In case of forest lands the act of cutting wood, gathering forest produce and pasturing cattle. If such acts are accompanied with an assertion of the ownership of the soil would be evidence of adverse possession—*Sivasubra nanya v. Secretary of State* 9 Mad 285 (301)

To constitute adverse possession it is sufficient if there is an open hold the thing as owner and if some overt act is done upon execution of that act it is not necessary that any particular

235 (303) Moreover, it is not necessary that some acts should always be done upon the spot in dispute itself, but it is enough if some overt acts of ownership were done in relation to that spot, as for instance, enclosing it—*Clark v. Fliphinstone*, L. R. 6 App. Cas. 164.

In case of a tank the mere appropriation of the fish may not necessarily constitute adverse possession, but acts of an obviously proprietary character such as silt-lifting, mortgaging or re-excavation of the tank or the expenditure of large sums in clearing silt out of it, or the construction of masonry sluices in it will constitute adverse possession—*Dijy Chand Malik v. Jwar Chand*, 21 C. W. N. 190, 35 Ind. Cas. 60 (63); *Venkatarama v. Secretary of State* 20 M. I. J. 74, 33 Mad. 372.

A lot of land which was of no use to the owner was used by a neighbouring landholder for various temporary purposes and for more than twelve years he built a privy, a hut and a shed for cows, goats etc. but all these structures were of a flimsy and temporary character, it was held that user of this sort was insufficient to give a title to the land by adverse possession. User of this sort is common in this country and excites no particular attention. It is not intended to denote nor understood as denoting a claim to the ownership of the land. So also, the acts of throwing rubbish on the land of another and placing thereon pieces of furniture, scaffolding, building materials etc. are done in almost every part of the country without any claim to ownership being thereby intended—*Fram v. Gouddal* 11 Cl. & F. 338 (341, 342). It would be beyond reason to hold that the mere erection of a few thatched structures or the planting of a few trees on the waste land of another is any proof of an intention to occupy the land adversely to the owner—*Hehn v. Jachmi* 8 Ind. Cas. 208 (209) (Oudh). The use of a small piece of plaintiff's vacant land by the defendant for the purposes of a tackyard would not be sufficient to constitute adverse possession, especially when the parties are brothers—*Chandraseg v. Muttasani*, 21 Mad. 33 (35). The use of the plaintiff's abandoned waste land by the neighbours and the persons employed in the neighbouring village as a convenient place for answering the calls of nature, does not constitute adverse user, indeed these acts are not acts of possession at all—*Jegudis v. Balader*, 35 Cal. 421 (271).

Possession of a portion of the land only cannot be held to constitute constructive possession of the whole, so as to enable the possessor to claim thereby a title to the whole by Limitation—*Haji Ahmad v. Tota Jhal* 31 Cal. 312 (1-3). *Narsa Balader v. Gogewath*, 13 C. L. J. 63 (103) Cal. 313 (317), *M. Anji Sathan v. Premada Nath* 24 Cal. 256. But in many cases acts of encroachment on a tract of land may be evidence of the possession of the whole, as for instance if a large field is surrounded by high projected enclosures particularly well evidenced by the possession of the whole—*Cook v. Liphinstone*, L. R. 6 App. Cas. 164. When a tract of land with a natural boundary has been throughout claimed as owner, and acts of

ownership have been done upon various portions of it such acts of enjoyment may be accepted as evidence of the possession of the whole—*Sibasubramanya v Secretary of State* 9 Mad 285 (305) Where there are circumstances to link together various portions of ground the possession of a part amounts constructively to adverse possession of the whole—*Suresh Chandra v Shiti Kanta* 51 Cal 669 (679)

Where lands are held as remuneration for services the mere fact that the person who holds the lands does not render the services is not sufficient to make the holding adverse to the landlord just as non payment of rent by a tenant to his landlord does not constitute his possession adverse to the landlord To make the holding adverse there must be over and above the omission to render service an active assertion of an adverse right on the part of the defendant by a refusal to perform the service or a claim to hold the land free of such service—*Komargouda v Bhimaji* 23 Bom 602 (606 607)

So long as a person is in *permissive* occupation of land, his possession does not become adverse Thus the defendant executed a document on the 3rd May 1880 in which he admitted that the house which he (the defendant) occupied belonged to the plaintiff and promised to vacate it at the end of two years from the date of execution of the document In September 1893 the plaintiff brought a suit to recover possession of the house *Held* that the suit was not barred as the cause of action arose not from the 3rd May 1880 but from 3rd May 1882 (end of 2 years from the execution of the document) During these two years the defendant's possession was permissive and not adverse it commenced to be adverse from 3rd May 1882—*Shurudrappa v Balappa* 23 Bom 283 (286), see also *Gobinda Lal v Debendra Nath* 6 Cal 371 (314) Similarly, where plaintiff's husband conveyed to her two houses in satisfaction of her dower, and continued to reside in one of the two houses as before such residence must be treated as permissive and on behalf of the plaintiff, and was not adverse to her right over the property—*Ibrahim v Isa Rasul* 41 Bom 5 (12)

A person who holds possession *on behalf of* another does not by a mere denial of that other's title make his possession adverse so as to give himself the benefit of the statute of limitation Thus, a wife who holds possession on her husband's behalf, during his absence cannot acquire a title by adverse possession against her husband however long her husband may be absent—*Bijoy Chandra v Kally Prosanna* 4 Cal 327 (329) A licensee (whose possession is only permissive) cannot claim title only for possession, however long, unless it is proved that his possession diverse to that of the licensor to his knowledge and with his acquiescence—*Kodath Ambu Nayar v Secretary of State*, 47 Mad 572, 582 (P C) as 835 A I R 1924 P C. 150

Possession does not become adverse when the *intention* to hold

is wanting Thus *B* and his wife *R* adopted *G* (the plaintiff) by an unregistered deed of adoption which provided that *G* was to become full owner of the estate after the death of both *B* and *R*. *B* died in 1894 shortly after *R* drove away *G* from the house. In 1902 she executed two leases to defendants and died in 1907. In 1909 plaintiff (the adopted son) brought this suit to set aside the leases and to recover possession. The defence was that the suit was barred by adverse possession of *R* from 1894 to 1907. It was held that no limitation barred the plaintiff's suit. The deed of adoption being unregistered could not of course give a life interest to *R* and therefore *R*'s possession was wrongful, but since the plaintiff honestly though wrongly believed that *R* was entitled to possession for life and since she herself shared that belief and so remained in possession her possession was not adverse to the plaintiff but merely permissive as the intention to hold adversely in order to obtain an absolute estate was wanting—*Parsab v Gurappa* 38 Bom 227 (238) 24 Ind Cas 716.

Another important principle to be borne in mind is that the possession of the defendant does not become adverse to the plaintiff until the plaintiff is entitled to immediate possession. As observed by Mr Justice Markby. By adverse possession I understand to be meant possession by a person holding the land on his own behalf or on behalf of some person other than the true owner the true owner having a right to immediate possession—*Bejoy Chunder v Kally Prosanno* 4 Cal 327 (329). This well known rule is conveyed in the maxim *contra non valentem agere non currit prescriptio* i.e. prescription does not run against a man during the time when he is not entitled to immediate possession—*Tarubai v Venkatrao* 27 Bom 43 (51) *Malharjun v Amrita* 42 Bom 714 (718) *Chinto v Janki* 18 Bom 51 (57).

The possession of the defendant does not become adverse to the plaintiff where there was no notice or knowledge or circumstance that could have given notice or knowledge to the plaintiff that the defendant's possession was in displacement of his rights. Until the plaintiff had reason to know that his rights were invaded there could be no necessity for him to take action. Knowledge on the part of the person whose rights are invaded is an essential element of adverse possession—*Tarubai v Venkatrao* 27 Bom 43 (69). But actual knowledge is not necessary. Knowledge may be presumed from an open and notorious act of taking possession—*Tarubai v Venkatrao* 27 Bom 43 (52) *Mitra's Limitation* p 135 *Angell on Limitation* p 292.

Possession in order to be adverse, must have been used openly and without any effort made or step taken to effect concealment—*Rains v Buxton* (1880) 14 Ch D 533 (540). The possession taken must not be clandestine. The possession in order to ripen into a prescriptive title must be juridical and have none of the *extra possessionis* as *clam* or *aut*

precario And if in its inception it is vitiated by its clandestine, violent or permissive character, it must lose that character and become open, peaceable and as of right before it can cause time to run—*Tarubai v Venkatrao*, 27 Bom 43 (53)

Possession is never considered adverse if its commencement can be referred to a lawful title—*Doe v Brightwell* 10 East 583 *Bhasrabendra v Rajendra*, 50 Cal 487 (489) The possession of a manager of a family or guardian does not become adverse until he has distinctly repudiated the management or guardianship—*Nabab Mir Sayad v Yasin Khan*, 17 Bom 755 (758) One who holds possession on behalf of another cannot, by a mere denial of that other's title make his possession adverse so as to give himself the benefit of the statute of Limitation—*Bejoy Chandra v. Kally Prosanna* 4 Cal 327 (329) There must be some adverse act, so that if the possession has commenced and continued in accordance with any contract, express or implied, between the parties in and out of possession, to which the possession may be referred as legal and proper, it cannot be presumed adverse—*Dadoba v Krishna*, 7 Bom 34 (39) That is to say, if there be no adverse act, nothing overt and no unmistakable ouster, or taking of possession, and all that is done is referable to or consistent with and susceptible of explanation by, some title which does not impugn but recognise the right of the person seeking to recover possession, there can be no possession adverse to that person without notice or intimation to him of some kind, that an adverse claim has been set up in opposition to his right theretofore recognised—*Tarubai v Venkatrao*, 27 Bom 43 (53), *Itappa v Manavikraman*, 21 Mad 153 (159) A person who is once in possession in a fiduciary character does not cease to hold in that character merely because it becomes uncertain who is the actual person to whom he has to account—*Lyell v Kennedy*, 14 App Cas 437

Where a decree has been made declaring a right to and directing partition, but no proceedings have been taken in execution of the decree, and the parties have remained in *status quo* without any partition having been made, neither party can claim against the other to have been in adverse possession of any portion of the property—*Nasratullah v. Mujibullah*, 13 All 309 (315)

Adverse possession and easement distinguished —If a person stands in such relation to a particular thing that he has in fact dominion over it, and if he and those under whom he claims have in fact exercised this dominion from time immemorial or for the period fixed by the law of prescription, he becomes the legal owner of the thing, but in order that the possession may generate ownership, it is necessary that the possessor should hold the thing *exclusively*, and *for himself as owner* In other words to constitute adverse possession two things are necessary, viz physical fact of exclusive possession, and the intention to hold for as owner If, on the other hand, a particular act is done upo

with the belief that another is its owner and not with the intention to hold as owner, and if the particular act has been done continuously for the period fixed by the law of prescription, the person doing the act acquires a legal right to do that act, though the thing upon which it is done is in other respects under another's dominion. In principle, the act done is one of ownership or evidence of easement according as the person doing it asserts general ownership or a particular right in another's property, and in the first case the act of enjoyment is designated possession and in the latter case quasi possession. Thus is the distinction in principle between acts of ownership and acts which are done in the exercise of easements.—*Sivasubramanya v Secretary of State*, 9 Mad 285 (302-303)

613 Adverse possession by tenant against landlord.—There can be no adverse possession by the tenant *during the term of his lease*. A person who lawfully came into possession of the land as tenant from year to year or for a term of years, cannot, by setting up *during the continuance of such relation* any title adverse to that of the landlord, acquire by operation of the law of limitation any title as owner or any other title inconsistent with that under which he was let into possession. But the tenant can after the determination of the tenancy set up and acquire by prescription, against the landlord, a right as owner or such limited estate as he might prescribe for.—*Seshamma v Chikaya*, 25 Mad 507 (511). A person coming into possession under a lease which is *invalid* or *void* as against the person seeking to eject him is really a trespasser, and as such, after the expiration of the period prescribed by Article 144 acquires by prescription the limited right under the lease whether it be a lease for a term of years or a lease in perpetuity.—*Seshamma v Chikaya*, 25 Mad 507 (511, 512). *Budesab v Hanmanta* 21 Bom 509, *Thakore Fatesinghys v Bamany*, 27 Bom 515 (537).

A tenant's possession, unlike that of a stranger, is in its inception in subserviency to and consistent with the landlord's title, and as during the existence of the tenancy the tenant is bound to protect the interest of the landlord, the landlord has a right to act upon the supposition that his interest has not been betrayed and that no change in the character of the possession has taken place unless and until it is brought home to him that the contrary is the case. Therefore, though the law does not absolutely disable a tenant from disclaiming his landlord's title and claiming to hold in his own right, yet if he does so, the statute does not begin to operate unless the possession before consistent with the title of the real owner becomes tortious and wrongful by the disloyal acts of the tenant, which must be open, continued and notorious so as to preclude all doubt as to the character of the holding or the want of knowledge on the part of the owner. (See *Zeller v Eckhart*, 4 How (U S) 289 at p 296, cited in Angell on Limitation, 6th Edn p 458). It should be added, however, that if the disavowal of the landlord's title and the assertion of the claim to hold on the tenant's own account take place *during the currency of a definite term*

then the tenant's possession does not necessarily become adverse immediately. For in such a case the term would become forfeited only if the landlord does some act showing his intention on the ground of the denial of his title to determine the tenancy. In the absence of such act the term subsists and the possession is in law, possession under the lease. But the moment the term comes to its natural termination by effluxion of time, the disloyal tenant's possession becomes adverse—*per* Subramania Aiyer J in *Illappan v Manakkuraman* 21 Mad 153 (163).

Where the parties are landlord and tenant the acts which are relied on as evidence of adverse possession must be such that they were inconsistent with the purpose to which the landlord intended to devote the land. The acts of the tenant must be such that they amount to an assertion of possession adverse to the landlord and not acts which were presumably done with his permission or consent. Thus in the case of *bid* or waste lands, the cutting of grass and grazing of cattle would be ordinary acts by which possession would be asserted but if these acts are being done by tenants on the waste lands of their landlord, they cannot be held to amount to adverse possession because these acts are such as are ordinarily done on the waste lands of the landlord without any objection being raised and are in fact acts presumably done with the landlord's permission—*Wali Ahmed v Tota Meah*, 31 Cal 397 (405). The principle is the same of user committed upon land which are not inconsistent with the landlord's enjoyment of the soil for the purpose for which the land is held, do not amount to adverse possession—*Leigh v Jarr*, (1827), L R 5 12 D. 264 (273).

Persons who claim to be tenants of land for a term of years acquire any title to a permanent tenancy by 12 years adverse possession as against the landlord if they hold the lands—*Madhavu v Raghunath* 47 Ind 77, 31 Cal 12, 25 Ind. L R 1005 74 Ind Cas 362.

Mere non payment of rent by a tenant does not constitute adverse possession on the part of the tenant. Where there is any contract express or implied between the parties in reference to possession, to which possession may be referred as legal and not adverse, it cannot be presumed adverse. As the possession may be referred to the contract of tenancy under which the tenant entered, mere non payment of rent without payment of rent does not under ordinary circumstances constitute adverse possession—*Dadoba v Krishna* 7 Bom 31 (3), *Hulse* 3 B & Cr 757 *Tatia v Sals* 3 v 12 Ind 41 (42), *Gowda v Halapa* 9 Bom 419 (421), *Jagdeo Prasad v Poddar* Singh 2 P (P C), *Parash Narain v Puri Chander*, 4 Cal 101 (102), *Srinantha* 40 Cal 173 (180), *Ranga Lal v Abdul Gani* 2 Cal 101 (102), *Prem Sukh v Bhupia* 2 All 517 *Madan Mohan v Ramakrishna* L J 615, *Tiru Churna v Sarguda* 3 Mad 115 58.

the knowledge of the other party acquire by the operation of the law of adverse possession a title as owner or any other title inconsistent with that under which he was let into possession—*Bakha Singh v Ram Narain* 47 All 73 22 A L J 905 A I R 1925 All 133

When a mortgagee in possession under a usufructuary mortgage holds over after the time limited in the mortgage deed for surrender of the property his possession does not by that fact alone become adverse to the mortgagor who still has a period of sixty years within which to sue for recovery of possession—*Pokkha' v Bishan* 20 All 115 (117) Where a mortgagee pays only a part of the consideration and is in possession of the whole of the mortgaged property he cannot by the mere assertion of a larger interest than what was validly passed to him under the mortgage acquire a title by 12 years' possession The mortgage is valid to the extent of the amount actually advanced and the mortgagee's possession of the property is not adverse to the mortgagor The latter can redeem it within sixty years under Article 148—*Rajas Tirumal v Pandita Muthial* 35 Mad 114 (119)

But it would be going too far to say that in no possible case can a mortgagee set up an adverse title to the mortgaged property A mortgagee can set up adverse possession if his possession at its inception was that of a trespasser—*Jiwa Khan v Lakshmi Chand* 232 P L R 1911 Thus where a mortgagee obtained an unregistered sale of the equity of redemption and thereafter held possession of the property for more than 12 years held that the unregistered sale-deed though inadmissible to prove the passing of the title to the vendor was admissible for the purpose of determining the nature of the possession taken by the vendee (mortgagee) The deed of sale did not create any title in favour of the mortgagee leaving him in the position of a trespasser and as his possession extended for over a period of 12 years he became full owner of the land—*Qadar Bakhsh v Mangha Mal* 4 Lah 249 (251) 73 Ind Cas 829 A I R 1923 Lah 195 *Shro Nath v Tulsi Patel* 12 O L J 139 A I R 1925 Oudh 385 So also where a mortgagor surrendered his equity of redemption to the mortgagee but there was no registered deed the possession of the mortgagee thereafter for more than 12 years perfected his title to the property—*Bashir Hussain v Chandrabai* 25 O C 83 A I R 1922 Oudh 133 Where a mortgage of a certain property was executed by persons other than the real owner who however was aware of the mortgage and acquiesced in it the mortgagee's possession became adverse to the real owner from the date of the mortgage and the persons who executed the mortgage were entitled to redeem to the exclusion of the true owner—*Pursollam v Sagaji* 28 Bom 87 (91 92) A mortgagee remaining in possession of the mortgaged property for more than 12 years in full ownership in satisfaction of the mortgage debt under an oral sale from the mortgagor acquires an absolute title to the property and the mortgagor's right to redeem is

extinguished—*Handisam v Chinnabha* 44 Mad 253 257 (dissenting from *Ariyaputhira v Vuthunmaraswamy* 37 Mad 423)

The parties to a mortgage by conditional sale entered into an agreement whereby the mortgagor gave up all his equity of redemption in the property mortgaged. The agreement was not registered but both the parties consented to the complete transfer of the equity of redemption and both parties acted on the agreement for nearly 40 years. On a suit being brought by the mortgagor for redemption held that the mortgagees had been in adverse possession for more than 12 years and the suit was barred—*Khadu v Steo Parson* 39 All 423 (426) 17 A L J 366

615 Adverse possession by co mortgagor.—Where property has been mortgaged by several co sharers and one of them redeems it the possession of the redeeming co sharer does not become adverse to the other co-sharers until there is an assertion of an exclusive title and submission to the right thus set up. The principle is that as long as a possession can be referred to a right consistent with the subsistence of an ownership in being at its commencement so long must the possession be referred to that right rather than to a right which contradicts the ownership—*Ram Chandra v Sadashiv* 11 Bom 422 (424) *Bhaudin v Sheikh Ismail* 11 Bom 425 (428) *Faki Abas v Faki Nurudin* 16 Bom 191 (196) *Chandbhai v Hasanbhai* 46 Bom 213 (215)

Even if the co mortgagor after redeeming the property re mortgages it to a third party this in itself would not amount to adverse possession as against the other co mortgagors—*Moidin v Oothumangaini* 11 Mad 416 (417) *Ram Chandra v Sadashiv* 11 Bom 422

But if the mortgage is a usufructuary one and the amount is satisfied out of the usufruct one co mortgagor cannot take possession of the entire property from the mortgagee but is entitled to recover only his individual share. If however he takes possession of the entire property he is then deemed to hold the shares of the other co mortgagors adversely to them—*Gobardhan v Sujan* 16 All 251 (256) *Inayet Hussein v Ali Hussein* 20 All 182 (184). But if the usufructuary mortgage is redeemed by one co mortgagor by paying the money out of his own pocket and is not redeemed out of the usufruct the redeeming co mortgagor can retain possession of the property as a lienor until he is paid the shares of the money payable by the other co sharers and such possession is not adverse to them—*Ramchandra v Sadashiv* 11 Bom 422 (424)

616 Adverse possession by third party against mortgagee or mortgagor.—Possession of mortgaged property obtained by a third party by ouster of the mortgagee in possession is not necessarily adverse to the mortgagor also since the latter is not entitled to immediate possession during the existence of the mortgage the possession can become adverse against the mortgagor only after he has become entitled to possession after extinction of the mortgage—*Muhammad Husain v Mulis Chand* 27

(396), *Vithoba v Gangaram*, 12 B H C R 180. *Chinto v Janhi*, 18 Bom 51 (58) *Ismdar Khan v Ahmad Husain* 30 All 119 (122), *Illappan v Manavithrama* 21 Mad 153 (164) *Shambhu v Nama* 35 Bom 438 (442), *Tarabas v Dattaram* 49 Bom 539 A I R 1925 Bom. 465 In such a case, a suit for possession by the mortgagor or those claiming under him will not be barred although one by the mortgagee may be—*Chinto v Janhi* 18 Bom 51 (56) The mortgagor, having once put the mortgagee in possession ordinarily has no right to possession himself until the mortgage is paid off The mere fact of the mortgagee's letting the property go out of his possession cannot give the mortgagor such a right before payment. And the party in possession though he may be a trespasser, would ordinarily be able to defend an action of ejectment at the suit of the mortgagor by setting up *jus tertii*—*Chinto v Janhi*, 18 Bom 51 (58) See also *Kunwar Sen v Darbari* 38 All 411 (415) If the true owner (mortgagor) has no right to immediate possession it is practically immaterial to him who is in possession Having no right to possession himself, he cannot eject the person in possession—*Tarabas v Venkatrao* 27 Bom 43 (51) If the trespasser pleads adverse possession both against the mortgagor and the mortgagee, the burden lies upon him to shew not only that his possession was adverse to the mortgagor—*Chinto v Janhi* 18 Bom 51 (54) but also that the mortgagor had notice that the trespasser was holding in denial of the mortgagor's right—*Periya v Shanmugasundaram* 38 Mad 903 (915) F B *Prima facie*, the possession by the trespasser by ouster of the mortgagee in possession is not full proprietary possession but is possession of a limited nature which would have the effect ordinarily of extinguishing the limited interest of the mortgagee and vesting it in the trespasser But there may be cases where the adverse possession against the mortgagee would also be adverse possession against the mortgagor as for instance where the mortgagor is entitled to immediate possession or where the possession of the trespasser is coupled with a *denial of the title of the mortgagor* also—*Ismdar Khan v Ahmed Husain*, 30 All 119 (121) *Periya Aiyar v Shanmugasundaram*, 38 Mad 903, 913 (F B) In such a case a suit for redemption brought by the mortgagor or his heirs would not fall under Article 148, but would be governed by Article 144 and would fail if the person in possession succeeded in proving that his possession was adverse to the mortgagor for more than 12 years prior to the suit—*Ram Prari v Budh Sen* 43 All 164 (168) *Jai Gobind v Abhastaraj*, 26 O C 308 A I R 1924 Oudh 40. Thus the plaintiff mortgaged his house with possession for a term which would expire in 1917 The mortgagee was dispossessed by the defendants in 1898 In 1908 they made certain additions to the building and when the plaintiff remonstrated with them they denied the plaintiff's title to the equity of redemption The plaintiff then brought his suit for a declaration of his title Held that the possession of the trespasser was not adverse to the plaintiff from 1898 to 1908, but it became adverse in 1908 when the

plaintiff's title was repudiated—*Peria Ayya Ambalam v Shunmuga Sundaram*, 38 Mad 903 (F B) As long as the mortgagee is in possession, he and all claiming under him represent the mortgagor's possession. If the mortgagee in possession is dispossessed by a third party on grounds affecting only his right, (e g his right as heir to represent the original mortgagee or his right to possession in spite of a third party's lien on the property,) then the dispossession of the mortgagee obviously does not imperil or call in question any right of the mortgagor, and the mortgagor is not concerned or entitled to insist on being immediately restored to possession, and the possession taken is not adverse to him and cannot cause time to run against him. But if there is an unequivocal ouster of the mortgagee by the third party preventing the possession of the mortgagor from continuing altogether by leaving no room for doubt that the person taking possession does not profess to represent the mortgagor but to hold in spite of him, then the mortgagor has a right to insist on immediate possession, because in such a case the mortgagor is as effectually and unmistakably displaced as if there had been no mortgage at all. When an ouster takes place in that manner, the mortgagor knows that no one is in possession who can represent or continue his possession or who is entitled preferentially to possession, and therefore he becomes entitled (and it is necessary and his duty) to claim possession immediately, if he does not protect his right, his equity of redemption will be barred—*Tarubai v Venkatrao*, 27 Bom 43 (68, 69). When the person taking possession of the mortgaged property shows by his acts or by his open declaration avows, that he does not pretend to represent either the mortgagee or the mortgagor, but is exercising a right claimed entirely on his own account, the disseisor affects not the mortgagee's interest alone, but the mortgagor's, and the mortgagor, having no one in his place professing to hold for him, is entitled to seek recovery and is under the necessity of taking action as if he had been personally ousted—*Tarubai v Venkatrao*, 27 Bom 43 (58). See also *Puttappa v. Timmaji*, 14 Bom. 176 (179), *Ammu v Ramakrishna*, 2 Mad 226, and *Cholmondeley v Clinton*, (1820) 2 J & W 1 (at pp 186, 187). In this English case, in which the owner of the equity of redemption had full notice of the claim of the trespasser, Lord Chancellor Eldon observed: 'I say, without entangling myself with the difficulties about seisin and intrusion, I am of opinion that the adverse possession of an equity of redemption for 20 years is a bar to any other person claiming that equity of redemption, and it is an adverse possession which produces the same effect as those things you call abatement, intrusion and disseision which belong to legal estates. It is an adverse possession which has the same effect, and for the peace of families and for the peace of the world, I think, ought to have the same effect, and therefore without going through more of the cases, I submit it to your Lordships that this bill cannot be maintained.'

So also in the case of a simple mortgage adverse possession by a stranger against the mortgagor (taken after the mortgage) does not become adverse to the mortgagee until the mortgagee is entitled to possession the principle is that adverse possession affects the interest only of the person who is entitled to immediate possession and since the mortgagee under a simple mortgage is not entitled to immediate possession his title is not affected by any adverse possession against the mortgagor. The interest of the mortgagor that is his equity of redemption is extinguished but the right of the mortgagee to enforce his charge upon the mortgaged property remains unaffected—*Priya Sakhi v Manbodh* 44 Cal 425 (433) *Kali Prasanna v Tara Prasanna* 23 C W N 815 *Nandan v Jumman* 34 All 640 (645) *Lyab iri v Sonimma* 39 Mad 811 (F B) 29 M L J 645 (overruling *Ramaswami v Poona Padayachi* 36 Mad 97) *Parthasarathy v Lakshmana* 21 M L J 467 35 Mad 231 *Raj Nath v Narain Das* 36 All 567 *Ludbrook v Ludbrook* [1901] 2 K B 96 Where the defendant has been in possession adversely to the mortgagor for more than 12 years a suit by the mortgagee for sale of the mortgaged property is governed by Art 132 and not by Art 144 in as much as it is not a suit for possession of immoveable property and the suit is not barred if it is brought within 12 years from the date on which the money becomes due. The adverse possession of the defendant against the mortgagor (which began subsequent to the mortgage) does not interfere with the mortgagee's right to bring the property to sale—*Rajnath v Narayan* 36 All 567 571 (F B). The possession of a person claiming to hold property adversely to the mortgagor does not become adverse to the mortgagee who has purchased the property at a sale in execution of a decree on his mortgage until after the sale when the ownership in and the beneficial title to the land for the first time vests in him—*Asimadar v Mahan* 33 Cal 1015 (1019) following *Pugh v Heath* (1882) 7 App Cas 235.

If however the adverse possession of a trespasser begins *before the execution of the simple mortgage* it will run against the mortgagor and mortgagee both—*Nandan v Jumman* 34 All 640 (645) *Parthasarathy v Lakshmana* 35 Mad 231 *Nallamuthu v Betha Naichen* 23 Mad 37 (39) *Thornton v France* [1897] 2 Q B 143. The term adverse possession clearly implies that the person against whom adverse possession is exercised is a person who is entitled to demand possession at the moment the adverse possession begins. Where such a person has the entire interest when the adverse possession begins he cannot by afterwards transferring a part of the interest by mortgage prevent the operation of prescription upon the entire interest—per Munro J in *Parthasarathy v Lakshmana* 35 Mad 231 21 M L J 467. In other words a distinction should be drawn between cases in which the adverse possession of a third party began *after* the simple mortgage and cases in which the adverse possession began *before* the simple mortgage. If the adverse possession began after the simple

mortgage the adverse possession affected the rights of the mortgagor alone but did not affect the right of the mortgagee to bring the property to sale. If however the adverse possession had begun before the execution of the simple mortgage it extinguished the right of the mortgagor as well as the security of the mortgagee. This principle was overlooked in the cases of *Ramaswami v Poona* 36 Mad 97 and *Pratab v Maheshwar* 12 O C 45 where it was held that adverse possession which began against a mortgagor after the execution of the simple mortgage extinguished the security of the mortgagee also. (This view proceeded from a misconception of the Privy Council decision in *Karan Singh v Bahar Ali* 5 All 1.) These cases are not good law. The Madras case has been expressly overruled by the subsequent Full Bench case of 39 Mad 811 and the Oudh case also should not be accepted as sound law.

An obstruction to a mortgagee obtaining possession (as purchaser) under his mortgage by persons who merely claimed a lien on the property and admitted the mortgagor's title to the property does not amount to adverse possession as against the mortgagee's title as purchaser—*Purnanand v Jamnabai* 10 Bom 49 (57).

Possession obtained by a third party not adversely to the mortgagee but under an agreement with the mortgagee cannot be adverse to the mortgagor. It is only when the possession commences to be in opposition to or in displacement of the mortgagor's rights and it comes to his notice or knowledge that it becomes adverse to him—*Tarubai v Venkatrao* 27 Bom 43 (69). The principle is that limitation does not begin to run against a plaintiff until he is under some necessity or duty to assert his title—*Ibid* (at p 68). Thus where after the redemption of a usufructuary mortgage the tenants who had been let into possession of the mortgaged land by the mortgagee continues in possession it was held that in the absence of notice to the mortgagor that the tenants claimed to hold adversely to him the possession of such tenants subsequent to the redemption was not adverse to the mortgagor, and they should be deemed to hold under the mortgagor under the same term as they held under the mortgagee—*Chinnappa v Pashaniappa* 18 M L T 492.

If the mortgaged property is redeemed by a third party with the knowledge and consent of the mortgagor he gets a lien on the property which he must enforce within 12 years under Article 132 but so long as the lien exists, his possession is not adverse to the mortgagor. If he does not enforce his lien within 12 years the lien will be extinguished and if he still holds possession of the property such possession is that of a person having no right and therefore adverse to the mortgagor. And if the adverse possession continues for more than 12 years his title will become perfect so that the mortgagor will be thereafter debarred from bringing a suit for redemption—*Sambhu v Nama* 35 Bom 438 (443). If the mortgaged property had been redeemed by the third party without the knowledge and consent of

the mortgagor the possession of the third party would have been adverse to the mortgagor from the date of redemption—*Ibid* (p 441)

617 Adverse possession by vendor or vendee—If the vendor remains in possession after sale such possession is adverse to the purchaser and if the purchaser does not bring a suit for possession within twelve years from the date of sale he will be barred under this Article—*Ananda Coomari v Ali Jamin* 11 Cal 229 (231) *Tew v Jones* 13 M & W. 12

If a sale takes place by an unregistered sale-deed the possession of the purchaser under that deed becomes adverse to the vendor from the date of the invalid sale—*Sheonath v Tulsi Pat* 12 O L J 139 A I R 1925 Oudh 385 *Qadar Buksh v Mangha Mal* 4 Lah 249 (251) *Mahipal v Sarjoo* 13 O L J 326 A I R 1926 Oudh 141 *Bashir Husain v Chandra pal* 25 O C 83 A I R 1922 Oudh 133 *Jasoda v Janak Misra* 4 Pat 394

Possession by vendor as tenant—The plaintiff purchased some land under a deed of conditional sale which provided that the purchaser should become absolute owner if the vendor did not exercise his right of repurchase in ten years. After the execution of the deed the vendor according to the terms of the sale deed remained in possession of the property as a tenant under the purchaser and as such he and his representatives continued to hold over for more than twelve years after the date fixed in the sale deed. Held that the possession of the vendor after the date fixed in the sale deed was that of a tenant holding over after the expiry of the term of the lease and did not become hostile to the plaintiff so as to defeat the latter's claim to recover possession—*Anantha v Holeyra* 19 Mad 437 (439)

618 Adverse possession by trustee, Mohant, etc—Where a trust is express even though the *cestui que trust* chooses to put up with the acts of the trustee and to take no steps to recover the trust property for more than twelve years yet he is not barred when he does so choose to pursue and endeavour to recover it. Section 10 applies to the case. But where the relations between the trustee and the *cestui que trust* are not express but have arisen by implication of law only (e g in case of a resulting trust upon failure of the declared trust) then if the trustee assumes an adverse attitude towards his *cestui que trust* the latter must seek his remedy within the period of twelve years. But so long as the trustee occupies the position of a trustee as soon as the declared trusts have failed and there is a resulting trust in favour of the settlor (i e so long as he does not assume an adverse attitude) his possession is essentially that of his *cestui que trust* and can only be changed into adverse possession against the *cestui que trust* by a conscious and deliberate act. That is to say he must repudiate all intention of holding for the resultant *cestui que trust* and he must assert his intention of continuing to apply the trust fund to uses which the Court has declared or which are known to

him to have failed. In that event his possession becomes adverse to his legal *cestui que trust* and if that person does not take steps within 12 years he will not be able to avail himself of the provisions of section 10—*Casamally v Currimbhoy* 36 Bom 214 (239 243 244). This case has however been disapproved of in *Mahomed Ibrahim v Abdul Latif*, 37 Bom 447 in which it has been held that a person claiming under a resulting trust is always barred by the 12 years rule without reference to the question whether the trustee assumed an adverse attitude.

Adverse possession by third party against trustee or cestui que trust.—Where a trustee in possession of lands has been dispossessed and the twelve years have run after his dispossession the *cestui que trust* although entitled successively on the prior estate and estates will be barred—*Wych v East India Co.*, (1734) 3 P Wms 308. Similarly where a *cestui que trust* who has been let into possession by the trustees has been dispossessed and the twelve years have run after his dispossession (whereby the *cestui que trust* is barred) the trustees are also barred—*Melling v Leah* (1855) 16 C B 652. In other words the rule that the statutes of limitation are no bar in the case of trusts is only a rule applicable between the *cestui que trust* on the one hand and the trustee on the other hand, and it is not a rule extending to third parties who have been in adverse possession—*Hovenden v Lord Annesley*, (1806) 2 Sch & Lef 629, *Lewin on Trusts* (5th Edn), pp 623 625.

619 Adverse possession against preceeding office holder becomes adverse against successor.—Possession which has already become adverse against a preceding trustee or shebait becomes adverse against the succeeding trustee or shebait as well. Thus if a trustee or mohant of a temple or a shrine alienates the trust property in violation of the trust and the alienee is in possession of the alienated property for more than 12 years, a suit brought thereafter by the succeeding trustee or mohant for possession of the property is barred. The period of limitation runs from the date of the alienation by the former trustee and the succeeding trustee does not get a fresh period of limitation from the time when he succeeds to the office as trustee. The trustees form a continuing representation of the property of the temple or shrine, they are not in the position of holders of successive life-estates consequently limitation runs against the idol or the shrine continuously, and not against each trustee individually as and when he succeeds to the office—*Nilmany v Jagabandhu*, 23 Cal 536 (545). *Dattagiri v Dattatraya* 27 Bom 363, *Pandurang v Dnyanu*, 36 Bom 135 12 Ind Cas 926, *Abdur Rasheed v Janki*, 9 O L J 2 A I R 1912 Oudh 24 (25), *Purna Chandra v Kinkar*, 9 Ind Cas 133 (134) *Chidambaranatha v Nallappa*, 41 Mad 124 (135) *Subbaya Pand v Mahammad Mustapha*, 46 Mad 751 757 (P C). See also *Chidar v Minammal*, 23 Mad 439 (440), *Damodar v Lakkan Das* 37 894 (P C).

But the above rule does not apply where a *permanant* lease was granted by the preceding trustee, and a succeeding trustee brings a suit to recover possession from the lessee. In such a case the lease being valid during the lifetime of the alienor, the period of limitation runs not from the date of the lease, but from the time when the plaintiff succeeds to the office as trustee—*Subbaya v Muhammad*, 46 Mad 751 (756) P C, *Abhisram v Shyama Charan* 36 Cal 1003, 1015 (P C); *Muthusamier v Sree Sree melhanthi* 38 Mad 356 (362).

Where property is vested in the juridical person (idol of a temple) and the *mohant* is only the representative or manager of the idol an act of alienation by the *mohant* is a direct challenge upon the title of the idol, and the idol or some person on behalf of the idol must bring a suit for possession of the alienated property within 12 years from the date of the alienation. But where the property is vested in the *mohant* or *shebait* the act of alienation by the *mohant* or *shebait* is not a challenge upon the title of the idol though the property may be endowed property in the sense that its income has to be appropriated to the purposes of the endowment, and there is no adverse possession so long as the person making the alienation is alive, and the possession of the alienee becomes adverse after the death of the alienor, when a new *mohant* or *shebait* succeeds to the office—*Mahant Ram Rup v Lal Chand* 1 Pat 475 (483).

620. Possession between co-owners, co-sharers etc:—Mere occupation or enjoyment or management of joint property by one co sharer does not constitute adverse possession as against the other co sharers, unless there is a disclaimer of the latter's title by open assertion of a hostile title by the former, or unless there is actual ouster or some act equivalent to ouster—*Baroda v Annada*, 3 C W N 774; *Ujalsi v Umahantia* 31 Cal 970 (973) *Bhasrabendra v Rajendra* 50 Cal 487; *Ayenenusu v Sheikh Isuf* 16 C W N 849, *Gobinda v Upendra*, 47 Cal 274 (278), *Subbaya v Rajeswara* 4 M H C R 357; *Niso v Govind*, 10 Bom 24; *Dinkar v Bhikaji* 11 Bom 365, *Gangadhar v Parashram*, 29 Bom 300; *Amrita v Shridhar*, 33 Bom 317 (322), *Itappan v Manavikrama* 21 Mad 153 (159), *Varada Pillai v Jeevarainammal* 43 Mad 244 (P C); *Hasim Ali v Afzal Khan*, 40 C L J 30, *Fazluddin v Raju*, 21 C. L J 192; *Hashmal v Mazhar*, 10 All 343 (346), *Ahmed Razu Khan v. Ram Lal*, 37 All 203, *Mubarakunnessa v Muhammad Raja Khan*, 46 All 377 (379), *Mahipal v Sarjoo*, 3 O W N 100, *Hardit Singh v Gurmukh Singh*, 1918 P R 64 (P C), *Chandbhai v Hasandhai*, 46 Bom 213 (215); *Velayutham v Subbaroya* 39 Mad 879 (882). Many acts which would be clearly adverse and might amount to dispossession as between a stranger and a true owner of land, would, between joint owners naturally bear a different construction—*Mahmad Ali Khan v Ahaja Abdul Gunny*, 9 Cal 744 (753). *Prescott v Nevers*, (1827) 4 Mason 326.

Where a special relationship exists between the parties, such as tenants

in common or members of an undivided family, the Court will presume that possession held by one is possession held on behalf of all the co-owners or members of the family, and it will lie on the possessor to prove that he held exclusive possession to the knowledge of those whose rights he seeks to affect by his possession—*Muthurakkoo Thevan v Orr*, 35 Mad 618 (621). The entry on, and possession of, land under the common title of one co-owner will not be presumed to be adverse to the others but will ordinarily be held to be for the benefit of all the co-owners, for the reason that the possession of one co-owner is rightful possession and does not imply hostility as would be implied in case of possession by a stranger. A co-owner might however establish a plea of adverse possession if it is clearly shown that he repudiated the title of his co-owners by an overt claim to exclusive ownership for more than 12 years before suit—*Jogendra v Baladeo*, 35 Cal 961 (968, 969), *Glymer v Dawkins*, (1845) 3 Howard 674, *Hari Pru v. M. Aung Kraw*, 12 Bur L T 129 52 Ind Cas 629. And the burden lies on the defendant to shew, not merely that he has been in sole occupation of the disputed lands, but also that there has been a disclaimer by the assertion of a hostile title and notice thereof to the owner either direct or to be inferred from notorious acts and circumstances—*Jogendra v Baladeo*, 35 Cal 961 (970), *Alima v. Kullis*, 14 Mad 96 (97). Much stronger evidence is required to show an adverse possession held by a tenant in common than by a stranger, a co-tenant will not be permitted to claim the protection of the statute of Limitations, unless it clearly appears that he has repudiated the title of his co-tenant and is holding adversely to him, it must further be established that the fact of adverse holding was brought home to the co-owner, either by information to that effect given by the tenant in common asserting the adverse right, or there must be outward acts of exclusive ownership of such a nature as to give notice to the co-tenant that an adverse possession and disseisin are intended to be asserted—*Jogendra v Baladeo*, 35 Cal 961 (969). "A silent possession accompanied with no act which can amount to an ouster or give notice to his co-tenant that his possession is adverse ought not to be construed into an adverse possession"—per Marshall C. J. in *McClung v. Ross*, (1820) 5 Wheaton 116.

Thus, between brothers in a joint family, where no partition is proved, the mere fact that one of the brothers went to live in a neighbouring village would not make the possession of the other brothers who continued to live in the family house necessarily adverse—*Jagivandas v. Bai Amba*, 25 Bom 362 (365). Where a part of the property inherited by two sisters was in the exclusive possession of one, and the rest of the joint property was in joint possession, the exclusive possession of the particular portion was not adverse to the other sister in the absence of any facts from which an adverse possession may be presumed—*Barada Sundari v. Annoda Sund* 3 C. W. N. 774 (776). Mere non-participation in the profits by one of

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Thus, between brothers in a joint family, where no partition is proved, the mere fact that one of the brothers went to live in a neighbouring village would not make the possession of the other brothers who continued to live in the family house necessarily adverse—*Jagwandas v. Bai Amba*, 25 Bom 362 (365). Where a part of the property inherited by two sisters was in the exclusive possession of one, and the rest of the joint property was in joint possession, the exclusive possession of the particular portion was not adverse to the other sister in the absence of any facts from which an adverse possession may be presumed—*Barada Sundari v Annoda* 3 C. W. N. 774 (776). Mere non participation in the profits by a

and exclusive occupation by another would not constitute adverse possession against the former in favour of the latter—*Illappan v Manavikrama*, 21 Mad. 153 (159); *Dinkar v. Bhikaji*, 11 Bom 365 (368). Mere non-participation in the rents and profits would not necessarily of itself amount to an adverse possession, but such nonparticipation or nonpossession may, in the circumstances of any particular case, amount to an adverse possession. Regard must be had to all the circumstances, and the most important element is the length of time—*Ayenuussa v Sheikh Isuf*, 16 C W N 849. *Gobinda v. Upendra*, 47 Cal. 274 (278). As between co widows, the possession of one is not adverse to the other, especially if the latter receives a maintenance allowance from the former—*Indoobunse v Gurbhuran*, 12 W. R. 158

But it is not correct to say that one co-owner can *never* hold adversely to the other co owner. The question depends upon the nature of the former's possession. Thus, one of the two brothers, joint owners of certain immoveable property, executed a deed of relinquishment in favour of the other (the plaintiff). The deed was never registered, but the brother (plaintiff) in whose favour it was made remained in possession of the entire property. *Held* that the document (though unregistered) was admissible in evidence for the purpose of showing the nature of the plaintiff's possession from the date of the document, and that coupled with the other evidence in the case, it was sufficient to show that the plaintiff had been holding adversely to his brother—*Jhamplu v. Kutramani*, 39 All 696 (698), 15 A L. J. 761. See also 35 Cal 961 cited *ante*

The possession of a co owner is not ordinarily adverse to the other co-owners. But where a person originally entered not as a co-owner but asserting a hostile title, and then became a co-owner and continued to assert a hostile title and exercised his possession to the exclusion of the other co-owner, his possession did not cease to be adverse—*Panhai Mohan v. Bishin Behari*, 38 C L J 220, A L. R. 1924 Cal 118. Ordinarily, sole possession by one tenant in common is not adverse to the others, but sole possession by one tenant in common maintained continuously for a long period without any claim or demand by the other tenants in common is evidence from which an actual ouster of the latter may be presumed—*Gangadhar v. Parashram*, 29 Bom 300; *Chandbhai v. Hasandhai*, 46 Bom. 213 (216); *Muhammad Ishaq v. Nathu*, 10 A L. J. 59.

After partition, the possession of one co-sharer cannot be taken as possession held on behalf of the others, even though the property has not been divided by metes and bounds—*Deba v. Rohlagi Mal*, 28 All. 479 (480)

620A. Adverse possession by Hindu female:—Where a widow is in possession of her life-estate in her husband's property, it is not competent to her, by mere assertion of an absolute proprietary title, in course of time to acquire such title by prescription against the reversionary heirs of her husband, who are not entitled to obtain possession till the widow's death—

Anund Kour v Sodi Narindan, 83 P R 1881 But where widows, who are only entitled to maintenance, take possession of the estate and dispose of it to strangers, and the possession of the widows and the strangers covers a period of more than 12 years a suit by the reversioners after the lapse of 12 years from the date of the widow's taking possession, would be barred, unless such possession was under an arrangement with the reversioners—*Sham Koer v Dak Koer* 29 Cal 664 (P C) If a Hindu widow who has not a scrap of title to the possession of the property (*e g* a widow, during the life of her son or son's widow) takes possession of the property not in the capacity of a widow but absolutely and without any qualification, and makes a gift of the property to strangers, her possession would be a bar to the title of all persons who claim as reversioners either of her husband or of her son—*Lachkan Kunwar v Manorath*, 22 Cal 445, 449 (P C) Where the widow asserted that she was entitled as full heir to the separate share held by her husband, where in a written statement in a suit brought against her she had asserted that she and her co widow were the heirs of their husband and had all along been in possession and it was only as an alternative pleading that she set up a title to possession on the footing of a right to maintenance, where in an application to the Court she made an assertion publicly that she and her co widow were the heirs and the only heirs to the property, from which assertion mutation of it to her name followed; where the widow made an absolute gift of part of the property; and where she made such public assertion of a right to exclusive possession from 1859 to her death in 1895, the true inference was that her possession was adverse, and the reversioner's title was barred by limitation—*Salgur Prasad v Raj Kishore Lal*, 42 All 152, 157 (P. C) Where, according to the custom of the community to which the parties belonged, the widows were excluded from inheritance, the widow's possession for more than 12 years barred the reversioners' suit for possession—*Desai Ranchhodas v. Rawal Nathubhai*, 21 Bom. 110 (117) A separated Hindu died leaving two widows and a daughter-in-law, the widow of his predeceased son. Upon the death of the two widows, the daughter in law took possession of the property and remained in possession thereof for more than 12 years, and after her death the reversioners sued to recover possession Held that as the widow's daughter-in-law was not entitled to the estate, her possession must be regarded as adverse to the reversioners, whose cause of action accrued upon the death of the two widows of the last male holder. The suit was therefore barred—*Gajadhar v. Parbati*, 33 All. 312 (314) Where the widow of a member of a joint Hindu family takes possession on the death of her husband of property which was in his possession during his lifetime, there is no presumption that the possession taken is merely of a widow of a separated Hindu. In the absence of any evidence to that her claim was limited to a widow's estate, she must be acquired full title—*Kali Charan v. Puri*, 46 All 769 (772). "

A I R 1924 All 740, *Uman Shankar v Aisha Khatun*, 45 All 729, A. I R. 1924 All 86, 74 Ind Cas 869

Where, A, a widow who inherited the property of her husband and was entitled only to a limited interest, transferred certain property of her husband to B the widow of a predeceased coparcener of her husband in 1833, and the latter remained in possession of the property for more than 12 years after the death of A (which took place in 1843) and then B transferred the property to the defendants as though she had absolute title in it and then died in 1886, and then the plaintiffs who were the reversionary heirs of the last male holder (and as such entitled to the property after A's death) sued to recover possession of the property in 1888, *held* that the suit had been barred long ago by the adverse possession of B for more than 12 years after A's death (1843). Although a widow's estate for life never constitutes a possession adverse to the reversionary heir, still since in this case B did not obtain the property as a widow but in a different capacity, her possession for more than 12 years after A's death became adverse to the reversioners (plaintiffs) entitled to come in after A's death—*Mahabir v Adhikari*, 23 Cal 942 (P C)

Possession taken by a Hindu widow under an arrangement with the other members of the family and in pursuance of an award, cannot be adverse to the members of the family—*Radha Dulaiya v Rashick Lal*, 45 All 1 (5)

If a Hindu widow in possession of her husband's estate never claimed to have anything more than the limited estate of a Hindu female, she did not acquire any personal title to the property as her *stridhan*, but she makes it good to the estate of her deceased husband—*Lajuanis v Safa Chand*, 5 Lah 192, 198 (P C), 28 C W N 960, 80 Ind Cas 788, *Unirao Singh v Pirthi*, A I R 1925 All 369, *Chakradhar v Shabbant* 6 P L T 363, A I R 1925 Pat 460, *Brindaban v. Ram Narain*, A I R 1925 All 330, 85 Ind Cas 449. If a widowed daughter-in-law, who was not entitled to succeed to her father-in-law's property but was entitled only to maintenance, was allowed to remain in possession of the property in lieu of maintenance, and there was no evidence to show that she asserted any title adverse to the person entitled to inherit the property, *held* that the widow did not acquire the property as her *stridhan*, and that the only interest which the widow could have in the property was that of maintenance only. Consequently, any alienation of the property made by her was voidable after her death by the heirs of her father-in-law—*Jagmohan v Prayag Narayan*, 6 P. L. T. 206, 87 Ind Cas 473, A I. R 1925 Pat 523

621. Other cases of adverse possession.—In case of a religious endowment, if adverse possession is proved, time will run not only against the shebait but against the idol also, and time will run against the idol even in a case where no shebait has been appointed—*Administrator-General v. Balkissen*, 51 Cal 953 (959).

Under a mortgage of 1869 the mortgagee was entitled to immediate possession but by arrangements between the parties the mortgagor was allowed to remain in possession the right of the mortgagee to claim possession being kept alive. The property was sold by the mortgagor in the same year. A suit for pre-emption was brought in respect of such sale and decreed and the pre-emptor thereafter sold the property to the defendant in 1871. The mortgagee sued the defendant for possession in 1883. The defendant pleaded adverse possession for more than twelve years. *Held* that the possession of a person who purchases property by asserting a right of pre-emption is not analogous to that of an auction purchaser in execution of a decree. He merely takes the place of the original purchaser, and enters into the same contract of sale with the vendor (mortgagor) that the purchaser was making. There is privity between him and the vendor and he comes in under the vendor and his holding must be taken to be in acknowledgment of all obligations created by his vendor. Neither the possession of the pre-emptor nor that of the purchaser from him in 1871 is adverse to the mortgagee—*Durga Prasad v Shambhu Nath* 8 All 86 (90, 91).

Where lands granted to one member of a joint Hindu family were held by the joint family adversely to the individual interest of the grantee and his son, for more than twelve years the rights of the grantee and his son were barred—*Isudeva v Maguni*, 24 Mad 387, 396 (P C).

A wife during the prolonged absence of her husband who was erroneously supposed to be dead, made a *mourasi* grant of a portion of her husband's estate. The grantee remained in possession for upwards of 12 years. It was held that the lease being void, the position of the grantee was not that of a lessee but that of a trespasser, and that his possession for more than 12 years had perfected his title—*Bejoy Chunder v Kally Prosonna* 4 Cal. 327 (330).

Where the property of a deceased Hindu vests in an executor, in trust for the beneficiaries under the will, and the bequest fails such executor does not under the Indian law hold the property in trust for the heir of the deceased. A Hindu executor takes no estate (unlike an English executor) but only a power of management, and upon the purpose for which the executor is to hold the property failing, the property undisposed of vests in the heir at once. Consequently, the possession by the executor becomes adverse to the heir from the date of the testator's death—*Kherodemoney v Doorgamoney*, 4 Cal 455 (468).

Where a person has been in possession of a property for over 12 years as legatee with an absolute estate under a will by a testator who had no disposing power over the property, and no objection has been made by the persons entitled to the property, the person in possession acquires an absolute title to the property—*Ghanshamdass v Sarasuathibai*, 21 L. W. 415, 87 Ind Cas 621 A I R 1925 Mad 861.

Possession of plaintiff's land taken by an adjoining landowner.

[a mistake on the part of both parties as to the true boundary is adverse to the plaintiff—*Ma Shan v. Somasundaram*, 1 Rang 492, A I R 1925 Rang 111, 83 Ind Cas 132.

621A. Adverse possession of a limited interest:—Possession of a *limited interest* in immoveable property may be just as much adverse for the purpose of barring a suit to recover that interest, in the same way as adverse possession of a complete interest in the property operates to bar a suit for the whole property; consequently, such possession of a limited interest may be just as much adverse for the purpose of barring a suit for the determination of that limited interest, as adverse possession of a complete interest in the property operates to bar a suit for the whole property. Such adverse possession for limited interest is good only to the extent of that interest, though it is a good plea to a suit for ejectment—*Ishan v. Ramranjan*, 2 C. L. J 125; *Gopal Krishna v. Lakkiram*, 16 C W N 634 (636); *Icharam v. Nilmony*, 35 Cal 470 (476), *Madhava v. Narayana* 9 Mad 244 (247), *Thakore Fateh Singh v. Bamani*, 27 Bom 515 (536), *Swarhomoy v. Sourindra*, 42 C L J 14, *Sanharan v. Pertasani*, 13 Mad 467 (471); *Bhavarabendra v. Rajendra* 50 Cal 487 (490), *Budesab v. Hanmantia*, 21 Bom 509. If a trespasser while in possession claims a right less than the absolute ownership in the land, he will acquire by prescription only the inferior title set up by him. The title acquired will be determined by the *animus possidendi* of the trespasser—*Muthurakkoo v. Orr*, 35 Mad 618 (621). Thus, if a tenant encroaches upon the lands of his landlord outside his tenancy, and claims to hold these lands as part of his tenancy (i.e. he professes to hold those lands in his character as a tenant), and thus he holds possession of those lands for more than 12 years, the landlord's right to eject the tenant and recover khas possession is lost, but his proprietary possession (i.e. possession by receipt of rent) is not lost, because the possession of the tenant, so far as the latter right is concerned, has not been adverse—*Ishan v. Ramranjan* (supra), *Gopal v. Lakkiram* (supra), *Muthurakkoo v. Orr*, (supra). So also, where a landlord seeks to recover possession of land in his tenant's occupancy, and the tenant on the allegation of a perpetual tenancy successfully resists the landlord's attempt to dispossess him for the statutory period, the tenant can successfully plead the law of limitation in bar of a suit in ejectment by the landlord—*Budesab v. Hanmantia*, 21 Bom 509 (515). In other words, the tenant, by asserting a claim to hold as a permanent tenant, will acquire a permanent tenancy. The landlord's possessory right is extinguished, but his proprietary interest (i.e. right to receive rent) remains intact. See also 27 Bom 515 (546). So again, where a tenant transferred a non transferable occupancy holding and the transferee was in possession for more than 12 years but he never repudiated the title of the landlord but claimed to hold possession as tenant, held that a suit for recovery of actual possession by ejectment of the transferee (defendant) was barred by limitation. Although the defendant did

not set up an absolute title for the statutory period and had not consequently acquired by adverse possession such absolute title he has yet acquired by prescription the limited interest which he has set up namely the interest of a tenant. Consequently it was too late for the plaintiff landlord to seek to eject the defendant as a trespasser his title to recover actual possession was barred although his title to recover rent was not extinguished—*Icharan v Vilmonney* 35 Cal 470 (477) *Bhairabendra v Rajendra* 50 Cal 487 (490)

A tenant is not precluded by an admission of tenancy from showing that the nature of the tenancy asserted by him to the knowledge of the landlord has been adverse to the right to evict either at will or on notice given—*Thakore Fatesingji v Bamanji* 27 Bom 515 (539) *Ram Rakhya v Kamakhya Narain* 4 Pat 139

The mere fact that the tenant made a yearly payment of rent is not fatal to the plea of adverse possession set up by the tenant because the tenant is not denying the landlord's right to receive rent but merely denies the landlord's right to eject him and claims to be a permanent tenant—*Sanharan v Periasami* 13 Mad 467 (471) *Thakore Fatesinghji v Bamanji* 27 Bom 515 (536 540) *Charan Mahlon v Kamakhya Narain* 6 P L T 98 A I R 1925 Pat 357

So also the landlord's claim for enhanced rent may be barred if the tenant denies the landlord's right to claim enhanced rent and continues to pay the original rent for more than 12 years. In such a case the tenant will be entitled to continue to hold the land at the original rate of rent—*Gopalrao v Mahadevrao* 21 Bom 394 (396)

622 Tacking of adverse possession.—A person who is in possession of land without title has while he continues in possession and before the statutory period has elapsed a transmissible and inheritable interest in the property and if such person is succeeded in possession by one claiming through him who holds till the expiration of the statutory period such a successor has then as good a right to the possession as if he himself had occupied for the whole period—*Halsbury's Laws of England* Vol 19 p 157 *Ram Piar v Budh Sen* 43 All 164 (169) If the period of possession of a trespasser and his predecessor in title who was also a trespasser extended over a period of 12 years he acquired an absolute title to the property of which he had been thus in possession—*Babu Ram v Banke Behari* 3 A L J 424 The word defendant in this Article includes a person through whom the defendant derived his liability to be sued (see sec 2) and hence he can tack the period of the adverse possession of his predecessor in title to that of his own—*Namdev v Ramchandra* 18 Bom 37 (40) *Ali Saheb v Kasi Ahmad* 16 Bom 197 (199), *Ghisa v Gajraj* 18 O C 289, *Padajirao v Ramrao* 13 Bom 160 (165) One adverse possessor can tack the period of his own possession to the period of adverse possession held by another person through whom he derived his title so as to make up the period of twelve

years The principle is that a title by adverse possession in course of acquisition is heritable transferable and devisable—*Ganoo v Beni* 14 N L R 82 43 Ind Cas 943 The title of a wrong doer may be transferred to a third person while it is in course of acquisition so that if the possession of the original wrong doer together with that of his transferee covers a period of twelve years the title of the original owner would be extinguished—*Gossain Das v Issur Chunder* 3 Cal 224 (226) Where D sold a property to A but did not give possession and A sold the property to the plaintiff and in execution of a money decree against D the property was sold as his and purchased by the defendants and then the plaintiff brought a suit for possession of the property held that the defendants had a right to tack the period of their own possession to that of D's possession as against A—*Harjivan v Shivrani* 19 Bom 620 (625) The auction purchaser acquires the right title and interest of the judgment-debtor and therefore if a vendor retains possession of the property after the sale and the property is subsequently sold in execution of a decree against the vendor a suit by the vendee would be barred if the possession of the vendor and the auction purchaser covers a period of more than 12 years—*Ali Sahab v Kasi Ahmed* 16 Bom 197 (199) In a suit against an adopted son on the ground that his alleged adoption is invalid the defendant can tack the period of his own adverse possession to the period during which the adoptive mother was in adverse possession so as to complete the period of twelve years—*Padajirav v Ramrav* 13 Bom 160 (165)

But the defendant cannot add to his own adverse possession the adverse possession of another independent previous trespasser from whom he did not derive his liability to be sued (within the meaning of the definition of defendant in sec 3) and whom he does not represent by birth transfer or devise—*Ganoo v Beni* 14 N L R 82 *Ram Lakhan v Gajadhar* 33 All 24 (228) *Chandradaya v Chandra Kala* 49 Ind Cas 751 (Cal) *Secretary of State v Krishnamoni* 29 Cal 518 (P C) *Rama Chandra v Balaji* 45 Bom 570 *Charu Chandra v Nalush Chandra* 50 Cal 49 (66) *Basanta Kuriar v Secretary of State* 41 Cal 858 (874) P C *Karan Singh v Bahar Ali* 5 All 1 (7) P C The defendant cannot tack to his possession the possession of another person whom he has dispossessed—*Isudev v Eknath* 35 Bom 79 (90) *Lakshman v Vithu* 1895 P J 216 *Ram Kishore v Bandarkartan* 13 Cal 203 (207) *Ganoo v Beni* 14 N L R 82 See also Note 604 under Article 14.

Moreover the possession must be continuous that is there must be no interval between the defendant's own possession and the possession to which he was tacking his own Thus where in a suit by the landlord against the tenure holder to recover possession of land encroached upon by him the defendant was proved to have come into possession after an interval of some months after his father's death the defendant was held to be an independent trespasser, and could not add his own possession to

that of his father (alleging that the encroachment had been begun by his father) and hence there was no adverse possession for 12 continuous years to extinguish the plaintiff's title—*Midnapore Zemindary Co v Panday*, 2 P L J 506 (511) In order that the title of the wrong-doer may be barred by the adverse possession of a series of trespassers the possession by them must be continuous but if a period of time should elapse however short after the abandonment of one trespasser who has not been in full statutory period and before the entry of another, the title of the true owner is as from the time of such abandonment, restored to him without any entry or act done on his part —*Dart's Vendors and Purchasers* (7th Edn) Vol I page 474

623 Suits under this Article—*Suit by adopted son*—A suit by an adopted son to set aside an alienation made by his adoptive mother before the adoption and for possession is governed by this Article, and limitation runs from the date of adoption, not from the date of alienation—*Sreeramulu v Kristamma* 26 Mad 143 (147) *Sisaram v Rajaram*, 48 Ind Cas 230, *Venkataratnam v Venkataramesiah* 27 M L J 569, 25 Ind Cas 692, *Hari v Waman* 2 Bom L R 441; *Moro v Balaji*, 19 Bom 809 (816), *Ramakrishna v Tripurabai*, 33 Bom 88 (95)

A suit by the adopted son of the junior widow to recover property from the adopted son of the senior widow on the ground that the adoption of the latter is invalid falls under this Article, and limitation runs not from the date of the adoption of the plaintiff, but from the time when the defendant had taken possession of the property, see *Padajirau v Ramrau*, 13 Bom 160

A suit for possession by an adopted son against the defendant who is in wrongful possession of the properties left by the plaintiff's adoptive father is governed by this Article, and not by Art 119 even if the plaintiff's adoption is denied—*Chandama v Sahg Ram*, 26 All 40 (47, 48) See Note 494 under Article 119

Suits involving setting aside of sales etc—Where the main relief sought is the recovery of immoveable property, and a declaration of the invalidity of an instrument is sought only as an incidental step, the case will be governed by the 12 years' rule of limitation Thus, where the alienation of a property is void, it does not require to be set aside, and a suit for recovery of the property by cancellation of such alienation is governed by this Article and not by Arts 44, 91 and other similar Articles See Note 330 under Article 44 and Note 420 under Article 91

Where a property not belonging to the judgment-debtor but to a stranger is sold in execution of a decree, such stranger may treat the sale as a nullity, and sue to recover the property at any time within two years from the sale; such a suit is not governed by Art 12—*Massat*, 26 All 346 (353) See Note 281 under Article 12

Suit to recover endowed property—A suit by the su

to set aside an alienation of the trust property made by the preceding trustee and to recover possession is governed by this Article or Art 134 and would be barred if brought more than twelve years after the alienation—*Nilmoney v Jagabandhu* 23 Cal 336 *Behari v Muhammad* 20 All 482 (F B) See also Note 563 under Article 134

A suit by the donor's heirs for recovery of possession of property endowed to an idol on the ground that the endowment was invalid is governed by this Article and must be brought within twelve years from the date of the gift—*Sitaramji v Jadunath* 24 Ind Cas 72 79 (Oudh)

Suit against redeeming co mortgagor—A co mortgagor redeeming the entire mortgaged property and obtaining possession merely acquires a charge under sec 95 Transfer of Property Act and does not become a 'mortgagee' within the meaning of Article 148 The T P Act draws a clear distinction between a mortgage and a charge a suit brought against the redeeming co mortgagor by the other co mortgagors to recover their shares of the property is not a suit for redemption under Article 148 but is a suit for recovery of possession under this Article—*Vasudeb v Balaji* 26 Bom 300 (503) *Ramchandra v Sadashiv* 11 Bom 422 *Vithal v Dinkharrao* 3 Bom L R 685 *Faki Abas v Faki Nurudin* 16 Bom 191 *Mahdum v Jadi* 9 O C 91 *Basanta v Dhanna* 35 Ind Cas 450 (451) (Lah) *Sheo Ganga v Ranjit Singh* 52 Ind Cas 375 (Oudh) *Munsi v Ramasami* 41 Mad 650 (657) *Purna Chandra v Barada* 46 Cal 111 (116) *Jashishan v Budhanand* 38 All 138 (145) *Ram Narayan v Ram Dens* 6 P L J 680 63 Ind Cas 282 283 (Pat) *Narain Das v Siroj Din*, 27 P L R 65, A I R 1926 Lah 238 and limitation runs not from the date of the possession by the redeeming co mortgagor but from the date when the possession becomes adverse by the assertion of an exclusive title—*Mahdum v Jadi* 9 O. C 91 *Rama Chandra v Sadashiv* 11 Bom 422 (425) *Faki Abas v Faki Nurudin* 16 Bom 191 *Dhauddin v Sh Ismail* 11 Bom 425 (429) *Vithal v Dinkhar* 3 Bom L R 685 That is time runs when the redeeming co mortgagor denies the right of the other mortgagors to enter into possession until they have paid to him their shares of the charge upon the property which he has defrayed—*Narain Das v Siroj Din*, (supra) *Wasir v Girdhari* 71 Ind Cas 847 See Note 613 ante Contra—*Ashfaq v Wasir*, 14 All 1 (F B) *Ahsan Ram v Tash Ram* 38 All 540 (547), *Nura Bibi v Jagat*, 8 All 295 (300) *Saiduddin v Rafinal* 32 All 160 (162) and *Wasir Ali v Ali Islam* 40 All 683 (685) where the suit has been held to fall under Article 148 (and not under Article 144) on the ground that the redeeming co mortgagor stands in the shoes of the mortgagee and the period of limitation runs from the date when the original mortgage become redeemable and not from the time when the defendant redeemed the mortgaged property

Other suits—A suit to recover certain land the title to which had been declared in favour of the plaintiff by an award, is not a suit to enforce

specific performance of a contract under Article 113 (because an award is not a contract) but one falling under this Article Limitation runs from the date of the award—*Sornavalli v Muthayya* 23 Mad 593 (596) *Bhajahari v Behary Lal* 33 Cal 881 (883 885) *Sheo Narain v Beni Madho* 23 All 785 (287) See Note 471 under Article 113

Where a vendor delivers possession of only a part of the property sold the remedy of the vendee is not by a suit for specific performance but by a suit for recovery of possession of the rest of the property and such a suit is governed by Art 144 and not by Article 113—*Bhanjan v Sohaura* 9 Ind Cas 238 (239)

Where a vendor was out of possession at the time of sale and subsequently recovered possession a suit by the vendee to recover possession from the vendor would be governed by this Article (and not by Article 136) and the cause of action arises from the date of recovery of possession by the vendor and not when the vendor had been originally dispossessed—*Ram Prasad v Lakhi* 12 Cal 197 (199) *Sheo Prasad v Udal* 2 All 718; *Syad Nyamtulla v Nana* 13 Bom 424 (428)

Where the defendant has planted certain trees on the waste lands of the plaintiff a suit for removal of the trees and for recovery of possession falls under this Article and not under Article 32—*Muhammad Shafi v Bindeswari* 46 All 52 A I R 1924 All 413

A suit by one of the heirs of a Muhammadan for partition of the property left by the deceased is governed by Art 144 so far as the immoveable property is concerned and by Art 120 as regards the moveables—*Syed Noordeen v Syed Ibrahim* 34 Mad 74 (75)

624 Starting point of limitation—Limitation runs when the possession of the defendant becomes adverse to the plaintiff Any overt act by the person in possession of the property starts adverse possession The fact that the plaintiff (the party having title to the property) was not aware of the overt act does not make the possession less adverse—*Khuda Baksh v Karmun* 49 P L R 1915 27 Ind Cas 610 (611)

A Hindu widow in possession of her husband's property mortgaged it with possession in 1900 and in the same year sold the equity of redemption directing the vendee to pay off the mortgage In November 1907 she adopted the plaintiff and died in December 1907 The vendee paid off the mortgage and obtained possession of the land in March 1908 The plaintiff sued to recover possession in December 1909 Held that the starting point of limitation under this Article was not when the right of the plaintiff accrued (November 1907) but when the defendant's possession becomes adverse The defendant's (vendee's) possession did not become adverse until he obtained possession of the mortgaged property from the mortgagee (March 1908) for it was from this date that there was a clear indication in the shape of an overt act on the part of the vendee to indicate that he was asserting his rights under the sale deed The suit was therefore

time—*Hanangowda v Irgowda* 48 Bom 654 26 Bom L R 829 A I R 1925 Bom 9

The possession of the defendant does not become adverse to the plaintiff until the latter is entitled to possession of the property. So in a suit by an adopted son to recover property alienated by the adoptive mother before his adoption, it was held that assuming that the possession of the defendant was adverse to the widow that fact did not affect the plaintiff, who did not derive his right to sue from or through her and against whom the defendant's possession began to be adverse only after the adoption, when the plaintiff became entitled to possession—*Moro v Balaji* 19 Bom 809 (816). A Hindu died leaving a widow and a daughter. The widow alienated the properties for purposes not binding on the reversioner, and died in 1865. The alienees continued in possession of the lands to the exclusion of the daughter who died in 1901 and a suit was brought in 1912 by the reversioners for possession of the properties. It was held that Art 144 applied and the possession of the defendants (alienees) was adverse to the plaintiffs only on the death of the daughter when they became entitled to possession and the suit was not barred by limitation—*Neelakanta v Narayanaswami* 31 M L J 847. The last male owner of a certain property died leaving a widow and his mother. The widow alienated a portion of the land without necessity and placed the alienee in possession. She died in 1876. The mother afterwards died in 1892. The nearest reversioner died in 1903 without challenging the alienation or expressly assenting to it. In 1909 the reversioner next in succession to the deceased reversioner sued the alienee for possession of the land alienated. The defence was that the suit was barred by limitation. Held that the plaintiff's right to sue for possession was an independent right and not derived from or through the deceased reversioner, and consequently the defendant's possession though adverse to the deceased reversioner could not be adverse to the plaintiff till he was entitled to possession in 1903 and the present suit instituted within 12 years from that date was in time under Article 144—*Sundar v Salig Ram*, 26 P R 1911, (F B) 9 Ind Cas 300. On the same principle, adverse possession by a third party against the mortgagor does not become adverse to the mortgagee, until the latter is entitled to the possession of the mortgaged property (See Note 616 ante). So also adverse possession by a trespasser against the tenant does not become adverse to the landlord until after the expiry of the period of tenancy. See Note 613 ante.

The plaintiff obtained a decree in 1873 by which he became entitled to certain portions of land which were in the possession of the defendant the actual boundaries of which were not defined by the decree but were ascertained in execution in 1876. The defendant continued in possession of some of the lands and the plaintiff had to file a fresh suit to get possession of them, to which the defendant pleaded limitation. It was held

that limitation began to run when the boundaries of the lands were finally ascertained in 1876 and not from the date of the decree in 1873—*Jagajit v. Sarabjit* 19 Cal 159 171 (P C)

Where certain chakran lands which had been included in a *pains* mahal were resumed by the Government and settled with the zemindar and the patnidar brought a suit against the zemindar for possession of those chakran lands held that the period of limitation for the suit ran not from the date when the Government settled the lands with the zemindar but from the date when the zemindar's possession became adverse to the patnidar & when some act was done by the zemindar indicative of a hostile attitude on his part towards the patnidar. The possession of the zemindar may become adverse to the patnidar in a variety of ways & g when the lands are settled by the Zemindar with tenants or when the patnidar after being invited to come and take the lands does nothing and the zemindar thereafter makes other arrangements either for holding the lands in *khas* or for settling the same with *ijardars* or the like. In each case the facts have to be investigated having regard to the language of Article 144—*Nagendrabala v. Bejoy Chand Mahatap* 50 Cal 577 (584)

625 Burden of proof.—In a suit falling under Article 144 what the plaintiff is required to establish is his title to the property. The plaintiff need not prove possession. It is not for the plaintiff to prove that he was in possession within 12 years prior to suit—*Sayad Nyamitula v. Nana* 13 Bom 424 (4-8) *Karan Singh v. Bakar Ali* 5 All 1 (6) P C. It is only in cases falling under Article 142 that the plaintiff is required to prove possession within 12 years before suit. In cases under Article 144 the plaintiff may rest content with proof of title only in the first instance—*Faki v. Babaji* 14 Bom 458 *Jai Chand v. Girwar* 41 All 669 (673)

The plaintiff's title may be presumed under certain circumstances. Thus the admission by Government that they had paid rent for some years to the plaintiff is sufficient in law to raise a *prima facie* presumption of title in his favour and the onus of proving that the land belonged to Government and that rent was paid to the plaintiff under mistake lies upon the Government—*Vithaldar v. Secretary of State* 26 Bom 410

After the plaintiff has established his title his onus is discharged. He is not required to prove that his title has not been extinguished by the operation of limitation. It was held in *Inayet v. Ali Hussein* 20 All 182 (185) *Secy of State v. Vira Rayan* 9 Mad 175 *Secy of State v. Bavotti* 15 Mad 315 and *Secy of State v. Kola Bapanamma* 19 Mad 165 that in a suit under this Article the plaintiff was required to prove not only a legal title to possession but also to prove by some *prima facie* evidence that he had a subsisting title not extinguished by the operation of the statute of limitation before the defendant could be called upon to substantiate a plea of adverse possession. That is the plaintiff was required to prove title as well as possession within 12 years prior to suit. But these decisions

have been practically overruled by the Privy Council ruling in *Secretary of State v Chellihani Rama Rao* 39 Mad 617 (631) in which their Lordships have observed The onus of establishing title to property by reason of adverse possession for a certain requisite period lies upon the *person asserting such possession (i.e. upon the defendant)* If it were not correct it would be open to the possessor for a year or a day to say I am here be your title to the property ever so good you cannot turn me out until you have demonstrated that the possession of myself and my predecessors was not long enough to fulfil all the legal conditions It would be contrary to all legal principle thus to permit the squatter to put the owner of the fundamental right to a negative proof upon the point of possession In other words when the plaintiff has established his title to land the burden of proving that he has lost that title by reason of the adverse possession of the defendant lies upon the defendant—*Radha Gobinda v Inglis* 7 C L R 364 (P C) *Karan Singh v Bakar Ali* 5 All 1 (P C) *Kuthali v Kunharankutti* 44 Mad 883 891 (P C) *Inderpal v Thakur Din* 77 O C 77 *Parmanand v Sahib Ali* 11 All 438 (443) *Alima v Kutti* 14 Mad 96 (97) *Jobeda v Tulshi Charan* 36 C L J 472 A I R 1923 Cal 82 *Fahi v Babaji* 14 Bom 458 (467) *Vasideo v Eknath* 35 Bom 79 (91) *Syad Nyamtula v Nana* 13 Bom 424 (478) *Chitto v Janhi* 18 Bom 51 (57) *Alima v Kutti* 14 Mad 96 *Jaichand v Girwar Singh* 41 All 669 (671) 17 A L J 814 *Mad Amalilla v Badan Singh* 17 Cal 137 (P C) *Radha Kanta v Bhagawati* 1 P L T 192 *Girsakai v Chleda* 27 O C 130 *Muthia Chetty v Seena* 12 Bur L T 234 When it is found as a fact that the defendant had admitted the plaintiff's ownership up to a certain period then before the defendant can set up adverse possession he must show when the alleged adverse possession commenced—*Tulshi bai v Ranchhod* 26 Bom 442 (444) When the possession of the defendant was in the beginning lawful and not inconsistent with the plaintiff's title the burden lies on him to shew that his possession has assumed another character and has become inconsistent with the plaintiff's title—*Itappan v Manavikrama* 21 Mad 153 (159)

If the defendant fails to prove that he has been in adverse possession for more than 12 years the plaintiff is entitled to succeed simply on the strength of his title It is not necessary for him to go further and prove that he was in actual possession at some period within 12 years prior to the commencement of the suit—*Jaichand v Girwar Singh* 41 All 669 (670)

626 Invalid title cured by adverse possession —If possession is acquired by a person under an invalid title and he continues to remain in possession for more than 12 years, although the document relating to his title may be invalid for want of registration or any other ground yet the possession having lasted for more than 12 years the title becomes an unassailable one Therefore where a party originally enters into possession under an *unregistered* sale-deed and remains in possession for over 12 years

the defect of his title is cured by his having been in possession for the statutory period—*Mahipal v Sarjoo* 13 O L J 326, 3 O W N 100, A I R, 1926 Oudh 141 *Qadar Bakhsh v Mangha Mal* 4 Lah 249 (251), 73 Ind. Cas 889 So also, where the registration of a sale deed is found to be illegal the purchaser gets full title to the property purchased if he is put in possession in pursuance of the sale-deed and continues to be in possession for over 12 years, openly and adversely to the knowledge of the vendor—*Jasoda Kuar v Janak Missir* 4 Pat 394 A I R 1925 Pat 787 Similarly, where the mortgagor surrendered his equity of redemption to the mortgagee but there was no deed of surrender, and the mortgagee remained in possession for 40 years, he acquired proprietary title to the property—*Bashir Husain v Chandrapal* 25 O C 83, A I R 1922 Oudh 133 Where one brother executed a deed of relinquishment in favour of another, but the deed was never registered, and the brother in whose favour it was made remained in possession, held that the unregistered deed being insufficient to pass title, the possession taken under it must be held to be adverse and if it continued for more than 12 years, it was sufficient to create a title in favour of the person in possession—*Jhamplu v Autramani*, 39 All. 696 (698). -

PART IX—Thirty years.

145	Against a depositary	Thirty	The date of the deposit
	or pawnee to recover	years	or pawn.
	moveable property		
	deposited or pawned		

647 S ope — According to some cases of the Calcutta High Court this article applies even though the moveable property is *not recoverable in specie*—*Gangahari v Nabin*, 20 C W N 232, 34 Ind Cas 959, *Lala Gobind v Chairman*, 6 C L J 535, *Administrator General v Krishito Kamini*, 31 Cal 519 (affirming 7 C W N 476) Therefore the term moveable property as used in this Article includes money—*Lala Gobind v Chairman*, 6 C L J 535 So also, where the plaintiff made over to a goldsmith certain gold ornaments of the weight of one tola to be melted and made into new ornaments, and failing to get the ornaments on repeated demands instituted a suit for the return of one tola of gold or its price, held that this Article applied—*Gangahari v Nabin* (supra) But in the earlier case of *Issur Chunder v Jiban Kumari*, 16 Cal 25 it was held that the term 'deposit' meant a deposit of goods to be returned in specie In another earlier Calcutta case also it was held that this Article applied only to a case of a deposit which was recoverable in specie, and therefore the Collect was not a depositary of the surplus proceeds of a revenue sale remitted to his hands—*Secretary of State v Farid Ali*, 18 Cal 34 (241)

According to Madras, Panjab and Allahabad High Courts, this Article is applicable only to a deposit returnable *in specie*, and is inapplicable to a deposit of money—*Jasoda Bibi v. Parmanand*, 16 All 256 (258); *Kalyan Mal v Kishen Chand*, 41 All 643 (645), *Balakrishnudu v Narayanaswamy*, 37 Mad 175 (177), *Ganesh Lal v Chunni Lal*, 74 P R 1882, *Dalipa v Labhu Ram* 4 P R 1919. In the Allahabad case of 41 All 643 Walsh J did not apply this Article even to a case of deposit of gold mohurs (which were to be returned *in specie*), but applied Article 60, on the ground that the mohurs were 'money.'

The right to officiate as priest at funeral ceremonies of Hindus is in the nature of *immoveable* property, and a suit to redeem a share of such right is governed by Article 148 and not by this Article—*Raghoo Panday v Kassy*, 10 Cal 73 (74)

628 Deposit.—Although the term 'deposit' ordinarily implies the deposit of specific property returnable in specie, it has a wider meaning. If a Government security or a sum of money is delivered to be held as *security* for the performance of some engagement and upon the express or implied understanding that the thing deposited is to be restored to the owner as soon as the engagement is fulfilled, the person with whom the deposit has been made will be treated as a depositary—*Lala Gobind v Chairman*, 6 C L J 535 followed in *Nand Lal v Asutosh*, 55 Ind Cas 515 (Cal), see also *Upendra v Collector*, 12 Cal 113 (115)

But a simple deposit of money for safe custody (and not to be kept as security for the performance of any work) does not fall under Art 145 (but falls under Art 60)—*Ganesh Lal v Chunni Lal*, 74 P R 1882 *Balakrishnudu v Narayanaswamy*, 37 Mad 175, *Narmadabai v Bhabanishanhar*, 26 Bom 430 (so assumed), see also *Kalyan Mal v Kishen Chand*, 41 All 643 (645), *Jasoda v Parmanand*, 16 All 256 (258)

Where certain G P Notes were made over by the plaintiffs to the defendant to be kept by him in deposit on their behalf and if necessary to be used by him for raising funds for his own purpose, and the defendant sold all the notes, but had neither replaced them nor paid their value to the plaintiffs, *held*, that a suit to recover the value of those notes was governed by Art. 145, in as much as the transaction amounted to a deposit—*Administrator General v Krishna Kamini*, 31 Cal 519 (528). *Hill J.* however was of opinion (see pp 533, 536) that the transaction did not amount to a deposit, for an essential characteristic of a deposit properly so called was that the thing deposited should *not be used* by the deposittee, and that Article 145 would not apply, but Art 49 would be the proper Article, or even Art 115 or 120

The Madras High Court has held in *Balakrishnudu v. Narayanaswamy*, 37 Mad 175 (178) that the term 'deposit' should be taken to mean the sort of bailment known to lawyers under the name of *depositum* in the Roman law of Bailments which was accepted by Lord Bracton and after-

wards by Lord Holt in *Coggs v Barnard* (1703) 1 Sm L C 173, as fit to be enforced in England. This depositum is a bailment of a specific thing to be kept for the bailor and returned when wanted, as opposed to *commodatum* where a specific thing as a horse or a watch is lent to the bailee to be used by him and then returned, and both are contrasted with *mutuum* where corn, wine or money or other things are given to be used and other things of the same nature and quantity are to be returned instead. In the Limitation Act the word 'deposit' does not include so called deposits of money or other things which are not intended to be kept but to be used. The same view seems to have been taken in *Ganginns Kondiah v Gottipati Pedda*, 33 Mad 56 (at p 59) although it was not necessary for the decision of that case. Where the plaintiff deposited certain sum with the defendant at interest, and the defendant was not prohibited from using it nor was he bound to keep it invested in any particular way, and there was nothing to show that the defendant was a trustee of the fund, held that the defendant did not hold the money deposit within Article 145—*Samuel v Anantha-natha*, 6 Mad 351 (352). The Madras High Court has also held that there can be no 'deposit' if the thing deposited is not to be returned in the condition in which it would naturally remain at the time of return. Therefore, where the plaintiff gave certain loose rubies to the defendant, so that he might get them converted into an ear ornament, it was held that the transaction was not a deposit—*Narayansamy v Ayasamy*, 21 M L J 184, 18 Ind Cas 921. But in the recent case of *Kishlappa v Lakshmi Ammal*, 44 M L J 431, A I R 1923 Mad 578, 72 Ind Cas 842, the same High Court has laid down that the term deposit is used in Article 145 in a plain and simple language to mean simply that where one man's property is handed by that man to another, the latter becomes a depositary of it, it is not the intention of the Legislature that the Courts who have to administer the law should have to study either the case of *Coggs v Bernard*, or the Roman Law in order to ascertain what is the true meaning of Article 145, the term 'deposit' should not be confined to the strict meaning of *depositum* under the Roman Law, but also includes cases where a thing is handed over to a person on the understanding that the depositary might use the thing for his own benefit and then return it when demanded.

If ornaments, clothes and money are deposited with a person for safe custody, a suit to recover the ornaments and clothes (but not the money) falls under this Article—*Narmadabas v Bhabanishankar*, 26 Bom 430 (432).

A contract of bailment or deposit or pawn does not come to an end on the death of the bailee, depositary or pawnee, and the legal representative who succeeds to the estate of the deceased is bound by any contract to which the deceased was a party. Therefore a suit to recover a jewel from the legal representative of the original depositary falls under this Article and not under Article 48 or 49—*Krishnaswami v Gopalachariar*, 20 L W. 758, A I R 1923 Mad. 185.

The plaintiff handed over a jewel to the defendant to pledge it and raise loan on it for the plaintiff. Plaintiff paid off the loan, but the defendant who got back the jewel retained it, and refused to return it to the plaintiff. *Held* that as there was no agreement that the jewel should remain in deposit with the defendant after the repayment of the loan, this Article could not apply to a suit brought by the plaintiff to recover the jewel. The suit fell under Article 49—*Gopalasami v. Subramania*, 35 Mad 636 (638), 12 Ind Cas 207.

629 Demand and refusal —A suit for recovery of moveable property deposited is governed by this Article, and not by Art 48 or 49, even though there has been a demand for the return of the deposit and a refusal by the depositary, limitation runs from the date of the deposit, and not from the date of refusal—*Narmadabai v Bhabanisankar*, 26 Bom 430 (432) *Gangineni Kondiah v Gottipati Pedda*, 33 Mad 56 (61); *Promotho v Prodyumna*, 26 C W N 772. *Gangahari v Nabin Chandra*, 20 C. W. N 232, 34 Ind Cas 959. In England, however, time runs from the date of the demand and no cause of action accrues until there is a demand and refusal—*Wilkinson v Verity*, (1871) L R 6 C P 206; *In re Tidd*, [1893] 3 Ch 154 (156).

The Allahabad High Court is of opinion that in order to entitle the owner to sue for possession of the goods deposited or to recover damages for their loss if they are not restored to him, he must make a demand. As there is an implied contract that they will be returned on demand, on failure to return them on demand, there is a breach of contract, and the owner may sue *in contract* in which case Article 145 will apply. On the other hand, the owner may sue *in tort*, owing to the unlawful withholding of the goods, and in that case Art 49 would apply to the suit, being a suit for return of specific moveable property wrongfully detained—*Kalyan Mai v Kishen Chand*, 41 All 643.

630 Art. 145 and Art 49 —Article 145 is the special Article dealing with a suit against a depositary to recover moveable property deposited. Article 49 on the other hand deals generally with a suit for other specific moveable property, and has no application where the specific provision contained in Article 145 applies. Article 49 cannot be deemed to provide for the cases where the possession of moveable property is transferred to another by reason of a confidential relation such as is involved in a deposit—*Gangineni Kondiah v. Gottipati Pedda*, 33 Mad 56 (57). *Promotho Nath v Prodyumna*, 26 C. W. N. 772, 69 Ind Cas 900. Article 49 does not apply where there is a 'deposit' in any sense of the term—*Kishappa v. Lakshmi Ammal*, A I. R 1923 Mad 578, 44 M. L. J. 431.

146—Before a Court Thirty When any part of the principal or interest was established by Royal years.

Charter in the exercise of its ordinary original civil jurisdiction by a mortgagee to recover from the mortgagor the possession of immoveable property mortgaged	Thirty years	last paid on account of the mortgage-debt
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631 Where no part of the principal or interest has been paid the extended period of limitation prescribed by this Article cannot be taken advantage of and the twelve years rule will apply—*Ran Chunder v Juggutmonmohini* 4 Cal 283

This Article refers to suits instituted in High Courts similar suits instituted in mofussil Courts are provided for in Article 135

146A —By or on behalf of any local authority for possession of any public street or road or any part thereof from which it has been dispossessed or of which it had discontinued the possession	Thirty years	The date of the dispossession or discontinuance
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632 This Article does not apply where the suit is brought not by any local authority, but by a private person to oust the defendant from the road encroached—*Achar Singh v Badhawa* 124 P R 1917 15 Ind Cas 285

The local authority need not be the owner of the street or road. This Article cannot reasonably be restricted to streets or roads formed by the Municipality on lands belonging to or acquired by it in a *proprietary* right. For instance, when the Legislature has vested a street in a Municipal Council such vesting does not transfer to the Municipal authority the right of ownership in the site or soil over which the street exists. Still the Municipality has a certain property in the soil of the street which would enable it as owner to bring a possessory action against trespassers, and such possessory suit would be governed by this Article—*Sundaram v Municipal Council* 25 Mad 635 (650)

If a person is in possession of the Municipal land for more than 30 years the right of the Municipality to the land is extinguished—*Asutosh v Corporation of Calcutta*, 28 C L J 494 49 Ind Cas 93, *Municipal*

missioners v. Sarangpans, 19 Mad 154 (157) Where a person has his verandah encroaching upon the street lands for upwards of thirty years, the site becomes the property of the person to whom the verandah belongs by the operation of this Article read with section 28 In such a case, it is no longer competent to the District Municipality to direct him to give up possession of the encroached lands under sec 122 of the Bombay District Municipal Act (II of 1901) because it is no longer a public street but the private property of the defendant—*Tayaballi v Dolad Municipality* 22 Bom L R 951 58 Ind Cas 326

In a Madras case Bhashyam Ayyanger J has made a fine distinction (known to English law and Scotch law) between the ownership of the Municipality over the land, and the ownership of the Government over the land and made the following observations as to the effect of Article 146A and sec 28 on this divided ownership The operation of sec 28 upon this Article would be to extinguish the right of highway on the expiration of 30 years from the date of dispossession of the Municipality by encroachment and thus free the land from the burden of the highway if the person encroaching upon the land be the owner of the land If the owner of the land on which the highway exists be a *third party* an encroachment of a permanent character on the public highway will also as a general rule operate as occupation of the soil and dispossession of the owner of the soil equally with the Municipality and his ownership will be extinguished in favour of the trespasser at the expiration of the ordinary period of limitation viz 12 years and at the expiration of 30 years the ownership thus acquired by the wrongdoer will be freed from the burden of the highway But if the highway has been dedicated to the Municipality by the *Crown* the right of the Crown can only be extinguished at the expiration of 60 years adverse possession or occupation by the trespasser Therefore in cases in which the site of the street belongs to the Crown the Municipality will be barred after the expiration of 30 years from the date of its dispossession, but the Crown will have the land freed from the burden of the highway and will be entitled to remove the obstruction or encroachment and after removing the same it may again dedicate as a highway the portion of land thus freed from the burden But if it suffers the obstruction to continue for a further period of 30 years the trespasser would become the absolute owner of the land —*Sundaram v Municipal Council* 25 Mad 635 (630 651), *Basaweswaraswamy v Bellary Municipal Council* 38 Mad 6 (11)

PART X—Sixty Years.

147—By a mortgagee Sixty When the money secured
for foreclosure or years by the mortgage be-
sale comes due

633 English Mortgage —It has now been settled by the Privy Council that Article 147 of the Limitation Act applies to the one class of mortgage in which alone a suit can be and always is brought for foreclosure or sale (i.e. foreclosure or sale *in the alternative* and not distributively) viz to English mortgages: it does not apply to suits on simple mortgages these are governed by Art 132—*Asudeva v Srinivasa* 30 Mad 426 (P C)

634 Mortgage by conditional sale —A suit to recover money due under a mortgage by conditional sale or for foreclosure is governed by Art 132 not by Art 147—*Sheoram Singh v Babu Singh* 48 All 307 24 A L J 295 A I R 11-6 All 493 94 Ind Cas 849 *Balaram v Mangla* 34 Cal 941 (1915) S B

635 Usufructuary mortgage —A usufructuary mortgagee cannot institute a suit either for foreclosure or for sale. But if the usufructuary mortgagee does not obtain possession under the mortgage a suit to recover the money by sale of the property (treating the mortgage as a simple mortgage) is governed by Art 132 not by Art 147—*Rama Chandra v Modhu*, 21 Mad 316 33 (F D)

636 Equitable mortgage —According to the Bombay High Court an equitable mortgagee by deposit of title deeds has a right to sue for foreclosure or sale, and the suit falls under this Article—*Manekji v Rustomji*, 14 Bom 269 (272 273) But in *Srinath v Godadhar* 24 Cal 348 (350) it has been held that according to the practice of the Calcutta High Court the appropriate remedy in case of equitable mortgage is not a decree for foreclosure but for sale. In this view, Article 147 cannot apply, but Art 132

148—Against a mortgagee to redeem or to re- cover possession of immoveable property mortgaged	Sixty years	When the right to redeem or to recover posses- sion accrues Provided that all claims to redeem arising under instruments of gage of
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property situate in Lower Burma which had been executed before the first day of May 1863 shall be governed by the rules of limitation in force in that province immediately before the same day

637 Suits under this Article — A right to officiate as priest at funeral ceremonies of Hindus is in the nature of immoveable property and a suit for redemption of such right therefore falls under this Article and not under Art 145—*Ragloo Pandey v Kassy* 10 Cal 73 (74)

Suit by purchaser from mortgagor — A purchaser of the equity of redemption in part of the mortgaged property is entitled to redeem his own portion of the property within 60 years from the date of the mortgage. All persons who have stepped into the shoes of the mortgagor are mortgagors for all purposes and this Article is applicable to a suit by a purchaser of the equity of redemption in a part of the mortgaged property—*Hari Ali v Ali Islam* 40 All 683 (685)

Suit against mortgagee's assigns — A purchaser who purchases the mortgaged property from the mortgagee upon the representation and in the belief that it was an absolute interest that he was purchasing is a transferee for valuable consideration and a suit by the mortgagor to recover the property from such purchaser is governed by the shorter period of limitation provided by Article 134 (See Note 563 under Article 134). But where the purchaser has knowledge that he was purchasing the limited interest of a mortgagee and where he simply takes a transfer of the mortgage a suit against him is governed by Art 148 not by Art 134—See *Drigpal v Kallu* 37 All 660 *Muthu v Kasabalinga* 17 Mad 316 *Bhagwan Sahai v Bhagwan Din* 9 All 97 and other cases cited at page 506 ante.

Second suit for redemption — Where a mortgagor brought a suit for redemption and obtained a decree and about twenty three years after the date of the decree applied to execute the decree and prayed that this application be treated as a suit held that as the decree was not executed the relationship of mortgagor and mortgagee did not cease to exist between the parties and the present application though barred under sec 48 C P Code could be treated under sec 47 C P Code as a fresh suit for redemption if the period prescribed by Article 148 had not then expired—*Hanmant v Shidu Shamthu* 47 Bom 692 (695) See also *Mukamdi Begam v Tufail* 48 All 17 A I R 19 6 All 20 92 Ind Cas 260

Suit for surplus profits retained by mortgagee —see 26 C W N 123 cited in Note 45 under Article 105 at p 313 ante

Suit by puisne mortgagee —A puisne mortgagee sued on his mortgage with uti petit alia the prior mortgage obtained a decree for sale and in execution thereof purchased the property himself and got formal possession. The prior mortgagee then sued on his mortgage without impleading the puisne mortgagee and obtained a decree for sale and in execution of the decree purchased the property himself and got possession. The representative of the puisne mortgagee then sued the representative of the prior mortgagee to redeem the prior mortgage. *Held* that the puisne mortgagee not having been impleaded in the prior mortgage suit for sale the decree in that suit was not binding on the puisne mortgagee or his representative (plaintiff) that the right to redeem the prior mortgage had not ceased to exist and the relationship of a puisne mortgagee and a prior mortgagee still subsisted between the plaintiff and the defendant and as such the plaintiff was entitled to redeem the prior mortgage and thus to remove the defect in his title to the property. The period of limitation was not 12 years but 60 years under Article 148, and the suit was not barred—*Priya Lal v Bohra Champa Ram* 45 All 268 A I R 1923 All 271. The same view is taken by the Patna High Court in *Ramjhar v Kashi Nath* 5 Pat 513 A I R 1926 Pat 337 94 Ind Cas 784. But the Calcutta and Madras High Courts are of opinion that the second mortgagee's suit for redemption of the prior mortgage is in effect a suit to enforce his own mortgage and is governed by Article 132 because the suit for redemption is only a means of securing the object of enforcing his own mortgage by sale—*Lakshmanan v Sella Muthu* 47 M L J 602 A I R 1925 Mad 76 84 Ind Cas 301. *Appayya v Venkatramayya* 20 L W 670 A I R 1925 Mad 150. *Nidhiram v Sarbessur* 14 C W N 439. *Aslamdhab v Joy Gopal* 91 Ind Cas 719 A I R 1926 Cal 560. See page 493 ante

638 Suits not under this Art etc—

Suit against redeeming co mortgagee —See Note 623 in Article 144 under sub-heading suit against redeeming co mortgagee at p 592 ante

Invalid sale of equity of redemption —Where a mortgagee in possession gave the mortgaged property in lease to the mortgagor and in execution of a decree against the mortgagor for arrears of rent in respect of the lease attached the mortgaged property and brought it up to sale in contravention of sec 99 of the Transfer of Property Act and purchased it himself the sale is voidable and not void and the mortgagor cannot successfully maintain a suit for redemption of the property without first getting the sale set aside (Art 12). Even if in such a case the mortgagee purchaser is treated as a trustee of the equity of redemption for the mortgagor the suit by the mortgagor cannot be regarded as a suit for redemption under Article 148 but a suit to enforce a trust under Article 120—*Rajkrishna* 47 Cal 377 (396) F B, 24 C W N 229

Suit on subsequent agreement —Where after the expiration of the term of a mortgage the mortgagor and mortgagee agreed that the mortgagee should continue in absolute possession for a fixed term in satisfaction of the debt and then restore the property free from the mortgage lien it was held that the agreement was distinct from the original mortgage, and was not intended to be a mortgage but a conveyance for a term of years and a suit to recover the property does not fall under this Article but must be brought within 12 years from the expiration of the term stipulated in the agreement—*Gopal v Desai* 6 Bom 674 (680)

Suit for accessions —Where a mortgagor after redemption sues to take over accessions made by the mortgagee the suit is not one really for redemption. The redemption being already completed the relation of mortgagor and mortgagee no longer subsists and the subsequent suit for accessions is not a suit against a mortgagee under this Article but a suit for possession under Article 144—*Khudadad v Girdhari* 1917 P W R 163

639 Adverse possession by mortgagee —See Note 614 under Article 144

640 Laches —The mortgagee can exercise his right of redemption at any time within the period of 60 years which the law allows him under this Article and no Court of Justice would be justified in diminishing that period on the ground of his laches in the prosecution of his rights—*Juggar Nath Sahoo v Syed Shah Mahomed Hossein* 23 W R 99 (P C) *Pokhpal v Bisla* 20 All 115 (117) *Aishori Mohun v Ganga Bahu* 23 Cal 228 (237)

641 Limitation —The right of redemption and the right of foreclosure are co extensive. Ordinarily and in the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage is created the right of redemption can only arise on the expiration of the specified period—*Bakhtawar Begum v Husaini* 36 All 195 199 (P C) *Vadju v Vadju* 5 Bom 22 *Husaini v Husain* 29 All 471 (473) *Raghu bar v Budh Lal* 8 All 95 (98) *Tirugnana Sambandha v Nallatambi* 16 Mad 486 (489) *Seethi Kutta v Kunhi Pathumma* 40 Mad 1040 (1062), *Brown v Cole* 14 Sim 427 *In Bhagwat v Parshad Singh* 10 All 602 (609) *Hesava v Hesava* 2 Mad 45 *Sri Raja Setrucherla v Sree Raja Lairscherla* 2 Mad 314 and other cases it has been held that there is no general rule of law which precludes a mortgagor from redeeming a mortgage before the expiry of the term for which the mortgage was intended to be made. But these decisions are no longer correct in view of the authoritative pronouncement of the Judicial Committee in *Bakhtawar Begum v Husaini Khanum* (supra). But there is nothing in law to prevent the parties from making a provision that the mortgagor may discharge the debt at any time during the specified period and take back the property. So where a mortgage by conditional sale provided that the mortgage was for 9 years but

that the mortgagor would be entitled to get back the property whenever the mortgage money would be satisfied out of the usufruct or paid by the mortgagor whether before or after the stipulated time of 9 years and it happened that the mortgage-debt was satisfied by the usufruct in three years after the mortgage it was held that time ran from the satisfaction of the mortgage-debt i. e. from the end of the third year and not after the expiration of 9 years—*Bakhtan Begum v. Husain* 31 All 195 199 (P C)

Where a mortgage by conditional sale provided that if at any time within seven years from the date of the mortgage the vendors would pay a stated sum to the vendee the latter would reconvey it was held that the time for a suit for redemption did not begin to run until after the expiration of the seven years as it was not obligatory upon the mortgagors to pay the money before that time—*Ha'ika Prasad v. Bhuvan Din* 31 All 300 (303)

Where a usufructuary mortgage provides for the mortgagee paying himself the debt (both principal and interest) from the rents and profits of the estate and for the surrender of possession when the debt is so paid off, and no time is fixed for redemption the mortgagor is not entitled to bring a suit for redemption before the mortgage-debt is wholly satisfied out of the rents and profits—*Tirugunna Sambandha v. Nallatambi*, 16 Mad 486 (490) But where a usufructuary mortgage provides that the profits are to be taken by the mortgagee in lieu of interest only and that the mortgagor would be entitled to redeem and obtain possession on payment of the principal sum and no date for redemption is specified the right to redeem the mortgage accrues to the mortgagor immediately from the date of execution of the mortgage—*Lala Soni Ram v. Kanhaiya Lal* 35 All 227 (P C) If there was an express provision in a usufructuary mortgage that the mortgage was redeemable at any time at the will of the mortgagor, the mortgagor's right to redeem accrued on the date of the mortgage—*Anwar Husain v. Lalmir*, 26 All 167 (171) In case of a *lakha muhki* mortgage (a usufructuary mortgage by which the land is made over to the mortgagee who has to look to its produce for the payment of his debt, principal and interest and in which the mortgagor undertakes no personal responsibility, and the mortgagee is not entitled to sue for the debt), the right to redemption accrues immediately from the date of execution of the mortgage, and time runs from that date—*Khandu Lal v. Faraf* 1 Lah 89 (91)

If there is an acknowledgment of the mortgage by the mortgagee, the period of 60 years will run from the date of such acknowledgment—*Vithu v. Keshav*, 6 Bom L R 38, *Anwar v. Lalmir*, 26 All 167 (172)

But a payment of interest by the mortgagor or the receipt of the profits of the mortgaged property by the mortgagee does not extend the period of redemption, though it will extend the period in respect of the mortgagee's suit to bring the property to sale—*Anwar v. Lalmir*, 26 All (169); *Kallu v. Halki*, 18 All 295, *Bhagwan v. Madhab*, 46 "

See Note 204 under sec 20

149—Any suit by or on behalf of the Secretary of State for India in Council	Sixty years	When the period of limitation would begin to run under this Act against a like suit by a private person.
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642 Scope of Article —Under the Act of 1871 this Article referred to suits in the name of the Secretary of State, but in the Acts of 1877 and 1908 the words in the name of have been changed into 'by or on behalf of'. Under the Act of 1871 this Article applied to suits by private persons for their own benefit in the name of the Secretary of State under the Acts of 1877 and 1908 such suits will no longer fall under this Article. The present Article applies only to suits which are brought for the benefit of or on behalf of the Government and it would seem as if it was not necessary that the suit should be actually in the name of the Secretary of State—*Starling* 5th Edn p 446

It is inapplicable to suits brought by persons claiming through Government as for instance to suits by persons claiming title under *pattas* from Government—*Jagadindra v Hemanta* 32 Cal 129 138 (P C) *Madhava v Lokenatha* 5 M I T 107 2 Ind Cas 314 *Assomeah v Rajoo Mia* 10 W R 76 *Moolchand v Amarnath* 1917 P W R 79 *Raghooath v Gaviud Glander* 14 W R 170, or to suits by purchasers from Government—*Kuthaperumal v Secretary of State* 30 Mad 215 (248) *Annala Mohan v Kina Das* 28 C W N 66 A I R 1924 Cal 391. *Nawab Bahadur v Gopinath* 13 C I J 625 *Brindaban v Bhoopal* 17 W R 377 *Hassain Dulsh v Ameen* 20 W R 231, *Dundee Roy v Pundit Bunssee*, 24 W R 61. Therefore where a purchaser of land from Government sued to recover possession within 60 years but more than 12 years from the commencement of adverse possession but within 12 years from his purchase held that the suit was barred under Article 144 Article 149 not applying to the case. The period of limitation was 12 years and the period of adverse possession which had already run against the plaintiff's predecessor in title (Government) should be reckoned against the plaintiff—*Annada Mohan v Kina Das*, (Supra). Even if the plaintiff (assignee from Government) in such a suit joins the Secretary of State as a co plaintiff the period of limitation for a suit for possession will not be sixty years under this Article but 12 years—*Pullinapalli Sankaran v Pillai Thalakat* 28 Mad 505 (506). In *Kylashashini v Gocoolmoni* 8 Cal 230 (235) there was a dicta that a person claiming under Government (e.g. an auction purchaser from Government) could sue within 60 years under this Article. But this is no longer good law in view of the Privy Council decision in 32 Cal 129 cited above.

A Municipality is not entitled to claim the benefit of this Article. It is not that when the Government has ceded land to a Municipality it cannot do with the land as it may suit it or privilege inherent in its power. It is just as the State itself cannot in a suit by itself claim the benefit of its 30 years rule but the ordinary rule of limitation will apply—*Municipal Council v. Sarangpuri* 19 Mad 1415. That is the principle of the case in that after the Government had once vested land in the Municipality the Government could lose all right of property in the land by virtue of adverse possession of the land by a trespasser for 30 years under Article 143 or 30 years under Article 144 before Article 140A was enacted) and this view has been assented to by *Bhushan Acharya J.* in *Saragaram v. Municipal Council* 25 Mad 63 where his Lordship has laid down that a Municipal Council is not by the creation of a street in it become the full owner of the site or soil on which the street exists and that although adverse possession by a trespasser for 30 years (Art 146A) may extinguish the right of the Municipality over the land the title of the Crown to the land will not be lost until the trespasser has had possession for 60 years (Article 149).

This Article applies only to suits brought by or on behalf of Government and does not apply to a suit brought by a private person against the Government—*Secretary of State v. Bala* 15 Mad 311 (318).

This Article applies only to suits and not to appeals or applications. Appeals by the Crown against acquittals are especially provided for in Article 137 and applications by Government are subject to the same period of limitation which is applicable to a private individual—*Appaya v. Hecctor* 4 Mad 155 (156). An application by Government under the Bengal Resumption of Revenue Regulation (II of 1819) is not a suit so as to make Article 149 applicable—*Mahadannissa v. Secretary of State* 53 Cal 561.

643 Suits under this Article.—Where a zeminder sold a ghatwali mahal as a mal mahal and not merely his right to receive the quit rent from the ghatwal and the vendee in collusion with the former ghatwal granted him a mokurari tenure, thus changing the nature of the tenure from a ghatwali to a mal tenure a suit by the Government to maintain its own nominee in possession of the land as ghatwal falls under this Article—*Chumber v. Jugurnath* 18 W R 130 (131).

A suit by Government for possession of a plot of land encroached upon by the defendant falls under this Article and is in time if brought within years from the date of the encroachment—*Ranchodlal v. Secretary of State*, 35 Bom 181 (189).

A suit for possession by Government under sec. 9 Specific Relief Act governed by Article 149 and not by Art 3—*Secretary of State v. Dinsha* 11 R 1925 Sind 277.

A suit for resumption of *lakhraj* land by Government falls under this Article and will be barred if the defendant was in possession of the land for more than sixty years before suit. Such suit by a private person would be governed by Article 131. See *Koylashbasini v Gocoolmani*, 8 Cal 230 (236).

A suit by Government to assess revenue on land alleged to be *lakhraj* is subject to the limitation under this Article and would be barred if the owner can prove 60 years' possession of it without payment of any revenue.—*Annada v Secretary of State*, 43 Cal 973 (979).

644 Adverse possession against Government—The period of limitation against the Government being 60 years, a person can convert his possession into an absolute title as against the Government, only by proving possession for 60 years. Possession which falls short of this period is insufficient to create a title. Mere evidence of long possession is not sufficient.—*Kodoth Ambu Narayan v Secretary of State*, 47 Mad 572, 582 (P C), *Krishna v Singaravelu*, 48 Mad 570, A I R 1905 Mad 780, *Abdul Wahed v Secretary of State*, 7 Lah 210, *Secretary of State v Chellikani Rama Rao* 39 Mad 617, 629 (P C), *Bank of Upper India v Secretary of State* 33 All 229 (232). The possession of a person for a period of 12 years, though it would be sufficient to bar a claim by any other party, would not exclude a claim by the Crown to recover what could be shown to be Government property.—*Secretary of State v Durbhoy* 10 Cal 312 (321) P C.

As long as a property remains in cantonments it must be regarded as land held for Government under the Government regulations and under the control of the military authorities, and no person can acquire title thereto by adverse possession. It is only when the property is handed over to the civil authorities that adverse possession may be set up for the first time.—*Bank of Upper India v Secretary of State* 33 All 229 (231, 232).

In case of forests and immemorial waste lands where the presumption is in favour of ownership of Government, the acts of adverse possession relied on by the claimant must be acts of undoubted ownership, such as the granting of leases to tenants for cultivation and the cutting of valuable trees for sale, and not such paltry acts as taking firewood, leaves and twigs and small trees and other acts which the Government permits in forests and waste lands for the benefit of the adjacent cultivation.—*Secretary of State v Krishnappa* 28 Mad 257 (298).

Presumption and Burden of proof—Where a suit was brought by the Crown for incorporating certain lands into a reserve forest under the Madras Forest Act, such lands being certain islands formed in the bed of the sea near the mouth of a tidal navigable river, and within 3 miles from the main land, and the defendant pleaded that he had acquired a title to the property by adverse possession held that the Crown was *prima facie* the owner of the islands (which were jungle lands) and the onus lay on the defendant to prove that he had acquired a title by adverse possession for more than

60 years it does not lie on the Crown to shew that the defendant's adverse possession commenced within 60 years before the suit—*Secretary of State v Chellikani Rama Rao* 39 Mad 617 P C (reversing *Chellikani Rama Rao v Secretary of State* 33 Mad 1) In 33 Mad 1 (4 5) it was held by the Madras High Court that if the lands came into existence as lands capable of occupation more than 60 years prior to the notification under sec 4 of the Mad Forest Act and defendant could prove that he was in possession of these islands say for 20 years prior to the notification the presumption would be that he was in possession for 60 years and the burden would lie on the Crown to prove that it had a subsisting title by showing that the defendant's possession commenced or became adverse within the period of limitation that is within 60 years before the notification it would not be necessary for the defendant to prove adverse possession for 60 years But the Privy Council in 39 Mad 617 (633 634) overruled this view and remarked

The objectors to afforestation (defendants) preferring claims are in the same position as persons bringing a suit for a declaration of their right and in such a suit the onus of establishing possession for the requisite period would lie on those persons The view of the High Court is erroneous It is an undisputed fact that these islands formed

in the sea belonged to the Crown That fact is fundamental until adverse possession against the Crown is complete that is for the period of sixty years that fundamental fact remains And it is no part of the obligation of the Crown to fortify their own fundamental right by any inquiry into possession or the acceptance of any onus on that subject

In some earlier Madras cases it has been held that the presumption under the Madras Forest Act is that all *unoccupied* land is at the disposal of the Government but if the land be really *occupied* when a notification is published under sec 4 it will be a ground for presuming that the occupant is the *prima facie* owner and shifting the onus on to the Government Thus if the claimant starts with an admitted possession and enjoyment for say 30 years the onus is certainly shifted to the Government the Government cannot compel the claimant to prove 60 years possession but must show a subsisting title of its own—*Secretary of State v Kola Bapanamma* 19 Mad 165 (166) *Secretary of State v Bavotti* 15 Mad 315 (317 321) These cases must be deemed as overruled by the Privy Council in 39 Mad 617 cited above See the remarks of Walsh J in *Jaichand v Girwar* 41 All 669 (at p 671)

In the district of Malabar and in tracts administered as part of it there is no presumption that forest lands are the property of the Crown consequently it is incumbent on the Crown either to show possession of the proprietary rights claimed within 60 years or if the defendants prove possession to show that the possession of the defendants commenced or became adverse within 60 years before suit—*Secretary of State v Vira Rayan* 9 Mad 175 (184) This case has been distinguished by their Lordships of the J1 :

Committee in 39 Mad. 617 (632), owing to the peculiarity of Malabar law

Where there is evidence both oral and documentary to show that the claimants had for a period beyond living memory or at least for fifty years uniformly asserted their rights to the forest tracts, and there was no evidence to prove that before the challenge which led to the present litigation there was any similar assertion of right on the part of the Government, the presumption was that the claimants were in possession for more than 60 years, and have acquired a title by prescription—*Sivasubramaniya v Secretary of State*, 9 Mad. 285 (303, 307), affirmed by the Privy Council in *Secretary of State v Siva Subramania*, 15 Mad. 101 (109)

In a suit against Government for possession of lands other than forest lands, if it is found that the plaintiff has proved possession for more than 12 years (say for 30 or 40 years) and the defendant (Crown) has failed to establish his title to the land or any possession within 60 years before suit, it will be presumed that the plaintiff has held possession for 60 years, and the burden will be thrown upon the defendant (Crown) to prove that he (Crown) has a subsisting title—*Krishna Aiyar v Secretary of State* 33 Mad. 173 (175) In the above Privy Council case (39 Mad. 617) the lands were jungle lands, and the presumption was that the lands *prima facie* belonged to the Crown and the onus was thrown upon the claimants but in this case, (33 Mad. 173) the lands not being forest lands no such presumption was made in favour of the Government

Where the plaintiff and his predecessors in title have been in possession of the plaint land for more than thirty years previous to the suit, the presumption is that they were in possession prior to that time also unless it is proved on behalf of Government that the land was unoccupied land or land in the occupation of Government before When possession for a certain period is shown it will be open to a Court deciding the facts to presume that possession prior to that period was also in the party whose subsequent possession is proved—*Narayana Pillai v Secretary of State*, 23 M. L. J. 162, 15 Ind. Cas. 257, *Venkatarama v Secretary of State*, 33 Mad. 362

Where it was found that certain hills (the property in dispute) were within the immemorial boundaries of the village of the claimant, and he was in actual possession of the hills, and on the other hand, there was on behalf of Government nothing to meet or contradict the above evidence as to the possession of the claimant, held that the claimant had made out a strong *prima facie* title backed up by possession, and it did not lie on him to prove adverse possession as against Government It lay on the Government to establish their title, if any—*Nawab Ajajuddin v. Secretary of State*, 28 Mad. 69 (71)

Where it is admitted or proved that the title to the property lay with the Government, and the plaintiff sues for a declaration that he has by prescription become the owner of the property, the suit must fail unless the

plaintiff is able to show that he has been in adverse possession for more than 60 years. Until that period has elapsed the Government's right in the property is not lost by section 28—*Abdul Wahab v Secretary of State*, 7 Lah 10 96 Ind Cas 447 A I R 1926 Lah 437, *Secretary of State v Sreeramamurthi* 22 L W 546 91 Ind Cas 179 A I R 1926 Mad 15

SECOND DIVISION : APPEALS.

150—Under the Code of Criminal Procedure 1898, from a sentence of death passed by a Court of Session	Seven days	The date of the sentence.
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150A—Under the Code of Criminal Procedure 1898, from a finding rejecting a claim under section 443 of that Code.	Seven days	The date of the finding
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This Article has been added by the Criminal Law Amendment Act XII of 1923 (popularly known as the Racial Distinctions Act)

151—From a decree or order of any of the High Courts of Judicature at Fort William Madras, Bombay, Patna Lahore and Rangoon in the exercise of its original jurisdiction	Twenty days	The date of the decree or order.
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645 The decree of the High Court in its original side should bear the same date as the judgment, and limitation should not be calculated from the date when the decree was signed by the Registrar—*Hayes Aboobucker v Official Assignee*, 25 M L J 560

An appeal in a suit under the Indian Divorce Act (IV of 1869) falls under this Article—*A v B* 22 Bom 612

The decree or order includes a judgment in the sense in which that word is used in the Letters Patent (Rangoon), therefore the period of limitation for an appeal under clause 13 of the Letters Patent from a judgment of the High Court (original side) is 20 days as prescribed by this Article—*Ariff v Perumal* 5 Bur L J 75 A I R. 1926 Rang 143

152—Under the Code Thirty The date of the decree or of Civil Procedure, days order appealed from. 1908, to the Court of a District Judge.

646. Where a decree is amended after it is passed and the appeal is directed against the amendment the period of limitation for appeal will be counted from the date of the amendment. But if the grounds of appeal have no relation to the amendment the period of limitation will run from the date of the decree and not from the date of amendment.—*Brojo Lal v Tara Prasanna*, 3 C L J 188. *Parameshtaya v Seshagiriappa*, 22 Mad, 364. See Note 52 under sec 5.

It has been held in some cases of the Calcutta High Court that if a decree is signed several days after the judgment is pronounced, the period of limitation runs from the date of signing the decree.—*Tarabai v Jagdeo*, 15 C W N 787, 10 Ind Cas 512, *Gangadhar v Shekharbasini*, 20 C W N. 967; *Bani Madhab v Malungim*, 13 Cal 104 (I B). This view has also been followed by the Nagpur J C Court which has recently laid down that no limitation begins to run against the appellant until the decree is drawn up and signed.—*Tuharam v Laxminarayan*, 89 Ind Cas 937, A I R 1926 Nag 207 [Contra—*Dindyal v Anops*, 22 N L R 60, A I R 1926 Nag 349]. But this view has not been accepted in several other cases, in which it has been laid down that what the appellant is concerned with is the date of the decree, which means under O 20, rule 7 of the C P Code, the date on which the judgment is pronounced, to him the date of signing of the decree is immaterial, such date is material only where the appellant has applied for a copy of the judgment and decree before the decree is signed. And so it has been held that time runs from the date of the judgment and unless an application for a copy of the decree is made before it is signed the period between the date on which the judgment is pronounced and the date on which the decree is signed cannot be deducted under sec 12. See the cases cited in Note 127 under sec 12.

The Nagpur Court has laid down in another case that under ordinary conditions where the decree is drawn up within the period of limitation prescribed for an appeal, the limitation for filing an appeal must be counted from the day on which the judgment is pronounced; but where owing to the default of the Court the decree was drawn up 17 months after the judgment was pronounced, the period of limitation would run from the date of the decree and not from the date on which judgment was delivered.—*Pandu v Rajeswar*, 20 N L R 131, 78 Ind Cas 996, A I R 1924 Nag 271.

Under O 20, rule 7, the decree shall bear the date on which the judgment is pronounced. Therefore if a judgment is written, signed and dated on :

17th January but is pronounced in open Court on the 10th February the decree must bear the date of the 10th February and limitation runs from that date. If the decree is dated 17th January the date is wrong—*Sagar mal v Lachmisaran* 1 Pat 771 (773)

Where a Court gives judgment but refuses to give a decree till the successful party complies with a certain condition the Court virtually postpones the decision of the suit. The effect of such an order is to pronounce a provisional judgment which does not become operative until the decree is prepared. The latter date is the date of the judgment as well as of the decree from which limitation runs. Where therefore a Court by its judgment directed that the decree was to be prepared only after a certain amount due as penalty was paid and the decree was actually made three months after the judgment on the day when the penalty was paid held that the time commenced to run for the purpose of appeal from the date of the decree—*Khudadad v Moriohkan* 9 S L R 193 34 Ind Cas 867

If an appeal is presented to a District Judge at his private house after Court hours on the last day of limitation the Judge has jurisdiction to accept it (though he is not obliged to do so) if he accepts it the appeal must be deemed to have been presented in time—*Thakur Din Ram v Hari Das* 34 All 482 (486) F B

An appeal to the District Judge against the decree of a Revenue Court under the Agra Tenancy Act is governed by the procedure prescribed by C P Code (vide sec 193 of the Agra Tenancy Act 1901) and is therefore governed by the rule of limitation prescribed by this Article—*Ram Lal v Amar Chand* 10 A L J 535 17 Ind Cas 653

153—Under the same Code to a High Court from an order of a Subordinate Court refusing leave to appeal to His Majesty in Council	Thirty days	The date of the order
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647 This article refers to an appeal under O 43 rule 1 clause (v) of the C P Code 1908 to the High Court from an order made by a subordinate Court refusing (under O 45 rule 6) to grant a certificate that the case is a fit one for appeal to the Privy Council

154—Under the Code of Criminal Procedure 1898 to any Court other than a High Court	Thirty days	The date of the sentence or order appealed from
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648 An application made to a Superior Court under sec 195 (6) of the Criminal Procedure Code to revoke a sanction granted by an inferior Court is not an *appeal* coming under Article 154 or 155 and such applications are not governed by the rule of limitation provided by the Limitation Act—*Bapu v Bapu* 39 Mad 750 (F B) *Pochas v Emperor* 40 Cal 239 *Purna v Jamila* 1 Lah 602 [The sanction clauses of sec 195 Cr. P Code have now been repealed]

155—Under the same Code to a High Court except in the cases provided for by Article 150 and Article 157	Sixty days	The date of the sentence or order appealed from
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649 An appeal preferred to the High Court under the Extradition Act is not governed by the period of limitation prescribed by this Article which is restricted only to appeals under the *Criminal Procedure Code*—*Hayes v Christian* 15 Mad 414 (415)

An appeal to the High Court under sec 408 (b) from a sentence exceeding 4 years passed by a Magistrate specially empowered is governed by the period of limitation prescribed by this Article See *In re Abdulla* 2 Rang 386

The limitation for an appeal under sec 476 B of the Criminal Procedure Code against an order refusing to file a complaint under sec 195 of that Code is 60 days under Article 155 and not 90 days under Article 156—*Sheo Prasad v Sheo Ba* 15 24 A L J 368 A I R 1926 All 211 93 Ind Cas 851

156—Under the Code of Civil Procedure, 1908, to a High Court except in the cases provided for by Article 151 and Article 153	Ninety days	The date of the decree or order appealed from
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650 Appeal under the C P Code —Article 156 when it speaks of the Civil Procedure Code is on the face of it speaking of a Code which relates to *procedure* and does not ordinarily deal with *substantive* rights and the natural meaning of an appeal under the C P Code appears to be an appeal governed by the Code of the Civil Procedure so far as procedure is concerned Thus an appeal to the High Court from the C the Recorder of Rangoon under the Burma Courts Act is,

sec 97 of that Act, governed by the Civil Pro Code as regards procedure, and the period of limitation for such appeal is consequently governed by this Article—*Aga Mahomed v Cohen*, 13 Cal 221 (223, 224) There seems to be no good reason for holding that an 'appeal under the C P Code' means only 'an appeal the right to prefer which is conferred by the Code itself' On the other hand, an appeal the procedure with respect to which from its inception to its disposal is governed by the C P Code may rightly be spoken of as an appeal under the Code Therefore, an appeal under the Land Acquisition Act, of which sec 54 lays down that appeals from awards under that Act are governed as to their procedure from the date of the filing of the appeal to its disposal by the rules provided for in the Civil Procedure Code, is governed by this Article although in the Land Acquisition Act there is no allusion to this Article—*Ramasami v Deputy Collector of Madura* 43 Mad 51 (55) Moreover, it has been held in *Manavikraman v Collector of Nilgiris*, 41 Mad 943 that an appeal under sec 54 of the Land Acquisition Act is to be treated as an appeal under sec 98 of the Civil Procedure Code It has also been pointed out in *Dropadi v Hira Lal* 34 All 496 (504), that there are several Acts for example the Succession Act, the Probate and Administration Act, and the Land Acquisition Act which make the C P Code applicable to the proceedings under those Acts and give a right of appeal to the High Court but do not prescribe any period of limitation for the appeal it has always been assumed that such appeals are appeals under the Code of Civil Procedure and are governed by Article 156 of the Limitation Act—*Ramasami v Deputy Collector of Madura*, 43 Mad 51 (56)

A second appeal under section 27 of the Burma Courts Act is not subject to the limitation of time prescribed by this Article because that section gives a discretion to the Judicial Commissioner (High Court) under certain circumstances to admit a second appeal and the period within which he may receive the appeal is also left to his discretion, to apply Art 156 to such a case would be to curtail the discretion which is unfettered in this respect—*Mahamad Hosein v Inodeen* 10 Cal 946 (950)

Letters Patent Appeals are not appeals under the C P Code, they are governed by the special Rules of the several High Courts, and not by this Article See *Naubat Ram v Harnam Das*, 9 All 115 (F B); *In re Hurruck Singh*, 11 W R 107, *Hurruck Singh v Toolsee Ram*, 12 W R 458 (F B)

Date of decree—See notes under Article 152

157—Under the Code Six The date of the order
of Criminal Procedure months appealed from
1898, from an order of
acquittal.

651 This Article refers to an appeal by the Government under sec 417 of the Criminal Procedure Code. The sixty days rule prescribed by Article 155 does not apply to appeals against acquittal—*Empress v Jyadulla* 2 Cal 436 (438)

Although an appeal under sec 417 Cr P Code would be in time if brought within six months still justice public interest necessity and policy all require that such appeals should be preferred with all reasonable expedition possible for there may be cases where a new trial may have to be ordered or further evidence to be taken and the larger the interval that has elapsed since the investigation and trial the greater is the inconvenience and difficulty not only to get witnesses together but to obtain from them accurate or reliable testimony—*Empress v Yakub Khan* 5 All 253 (255)

Although a period of six months is allowed under this Article the High Court may allow an appeal even after the period for sufficient cause shown under sec 5 See *Govern ment Pleader, Appellant* 1 Weir 791, *Anonymous*, 2 Weir 462

THIRD DIVISION : APPLICATIONS

158 — Under the Code of Civil Procedure, 1908 to set aside an award	Ten days	When the award is filed in Court and notice of the filing has been given to the parties
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652 Change — Before 1919, the 3rd column stood thus — When the award is submitted to the Court But by the Repealing and Amending Act of 1919 the 3rd column has been amended as it stands now

[The following decisions which were given before the above amendment are no longer good law —

Nobin Kolly Dabey v Ambica Charan Banerjee 5 C W N 813 — In this case it was held that an application under this Article was to be made within 10 days from the time the award arrived at the Registrar's Office for the purpose of being filed and not from the time when it was actually filed

Kalan v Roshanbati 8 S L R 190 27 Ind Cas 371 *Mansoor v Mahomedin* 5 S L R 125 13 Ind Cas 234 — In these cases it was held that the period of limitation must be computed from the date of submission of the award in Court and could not be computed from the date of service upon the objecting party of the notice of filing the award in Court

Jawahir v Mehr 1916 P W R 14 34 Ind Cas 250 — In this case it was held that time ran from the date fixed for the filing of the award and not from the date on which it was filed without the knowledge of the parties before the date fixed for its filing

653 Scope — This Article applies only to applications to set aside an award : i.e. to applications referred to in sec 522 of the Code of Civil Procedure 1882 (now para 16 of Second Schedule) to set aside an award on any of the grounds mentioned in sec 521 (now para 15 of the second Schedule) — *Muhammad Abid v Muhammad Asghur*, 8 All 64 (67) This Article does not apply to proceedings under para 12 or 14 of the 2nd Schedule of C P Code : i.e. to an application to remit an award for reconsideration of the arbitrators owing to some illegality of the award apparent on the face of it — *Appaya v Venkatasami* 1918 M W N 477, 47 Ind Cas 597 or to an application to modify or correct an award — *Hyder Saheb v Garia Chettiar* 24 M L J 483

Article 158 does not apply to an award which is *prima facie* an illegal award e.g. an award signed by only one of two arbitrators and by an umpire who has not been legally appointed Such an award is a nullity and need not be set aside within the period of limitation prescribed by this Article

But where the award is *prima facie* a legal award and can only be shown to be illegal after an enquiry into the allegations of the objector has been made, an application to set aside such award falls under this Article—*Ram Narain v Baij Nath*, 29 Cal 36 (41) explaining S All 64

654. Applications under this Article —An application to set aside an award on the ground that three out of five arbitrators were not present at the time of the award and did not sign it although it contained their names is an application to set aside an award on the ground of misconduct of the arbitrators—which is a ground mentioned in sec 521 C P Code—the application falls under this Article and must be made within the period prescribed by this Article—*Ram Narain v Baijnath*, 29 Cal 36 (39)

When a decree having been passed on an award, an application is preferred by the unsuccessful party to the High Court for revision, and it is found that the real object of the revision petition is to set aside the award, the revision petition is virtually an application to set aside an award, and is governed by the limitation of this Article—*Ghulam Khan v. Muzammil Hassan*, 29 Cal. 167, 183 (P C)

655 Limitation —The object of the Legislature in allowing so short a period as ten days for the preferring of objections to awards would seem to meet those cases where litigants who are at first very willing to have their cases referred to the decision of arbitrators whom they regard as amicably disposed towards them, subsequently do their utmost to make the award agreeable and to set aside the award the moment the arbitrators decide against them. The legislature has framed Article 158 with the object of discouraging and preventing such discreditable attempts—*Ram Narain v Baij Nath* 29 Cal 36 (41)

When the arbitrators state a special case for the opinion of the Court, the award is not completed until the Court expresses its opinion on the case submitted to it. Until this is done, there is no complete award, and the parties are not called upon to file their objections, if any, to the award—*Lakshman v Ramachandra*, 48 Bom 663, A I R 1925 Bom 22

Para 10 of Sch II of the C P Code lays down that notice of the making of an award shall be given to the parties. Art 158 must be read with this para, and the period of ten days must be computed from the day on which the parties receive notice that the award has been submitted and not from the day on which it is actually filed in Court—*Sita Ram v Rupram*, 13 V L R 172, 42 Ind Cas 66, *Sahib Ram v Chait Ram*, 96 P L R 1715, 22 Ind Cas 427. It should be noted that the last two decisions were given before the amendment of 1919, but they are in consonance with the amendment.

Section 5 of the Limitation Act does not apply to an application to set aside an award, the Court has no authority to extend the time prescribed by this Article on any sufficient ground whatsoever—*Danwari*, 18 C W. N 626 (628), 37 Ind. Cal 7. But see *Cas*

Raghubar Dayal 36 All 354 (361) where the High Court after setting aside in revision all orders in the case directed the lower Court to take cognizance of an application to set aside the award passed 3 years ago

But the time may be extended under sec 4—*Jawahar v Mehr* (1916) P W R 14 34 Ind Cas 250 (251)

The time requisite for obtaining a copy of the award shall be excluded by sec 12 (4) although it is not necessary to file a copy of the award with the application to set aside the award—*Sova Chand v Hurry Bux* 46 Cal 721 (727) 23 C W N 280 *Ghulam Khan v Md Hassain* 29 Cal 167 (183) P C *Wajid Ali v Nawal Kishore* 17 All 211 (215)

The fact that the defendant had not applied to set aside the award within ten days prescribed by Art 158 would not preclude him from appealing from the decree of the Court based upon the award if he does not contest the award on any of the grounds mentioned in sec 571 C P Code 1882 (para 15 Sch 2 C P Code of 1908)—*Muhammad Abid v Muhammad Asghur* 8 All 64 (66)

A Court should pass a decree in terms of the award *after* the expiry of the period of 10 days prescribed by this Article for an application to set aside the award. If the decree is passed *before* that period it is illegal and liable to be set aside—*Lakshman v Ramachandra* 48 Bom 663 A I R 1925 Bom 22 *Velu Pillay v Appaswami* 21 M L J 444 9 Ind Cas 197 *Ruddaraju v Narayanraju* 1910 M W N 1232 *Najmuddin v Albert Peuch* 29 All 584 (586) *Rajibhai v Dakhyaibhai* 45 Bom 832 (834) *Ranga Chetty v Govindasami* 1921 M W N 793 *Hardeo v Thana* 48 P R 1882 *Muni Ram v Ram Asray* 24 O C 234 *Sri Krishan v Relumal* 9 S L R 183 34 Ind Cas 845 (848) *Joymungul v Mohan Ram* 73 W R 429 (P C)

159—For leave to appear and defend a suit under the summary procedure referred to in section 128 (2) (f) or under Order XXXVII of the same Code	Ten days	When the summons is served
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Change —The words *or under Order XXXVII* have been added by the Indian Limitation Amendment Act XXX of 1925. For reasons of the amendment see notes under Article 5 *ante* in which a similar amendment has been made

656 When the summons is served —The only date to which reference can be made as regards limitation is the date of the service

of summons as shown in the sheriff's return. The defendant cannot escape the law of limitation by alleging that there was no service of summons at all. The question as to whether the summons was served or not may be taken into consideration on an application to set aside the decree if made (O 37 r 4)—*Madhub v Hoopendra* 23 Cal 573 (575).

After the time fixed by the summons for obtaining leave to appear and defend has expired the Court has no power to extend the time—*Quart Mahmudar v Sarat* 5 C W N 259 (16).

160 —For an order under the same Code to restore to the file an application for review rejected in consequence of the failure of the applicant to appear when the application was called on for hearing	Fifteen days	When the application for review is rejected
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161 —For a review of judgment by a Provincial Court of Small Causes or by a Court invested with the jurisdiction of a Provincial Court of Small Causes when exercising that jurisdiction	Fifteen days	The date of the decree or order.
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657 This Article corresponds to Art 160A of the old Limitation Act XV of 1877 and was introduced into that Act by sec 36 of the Provincial Small Cause Courts Act, IX of 1887.

Before the introduction of this Article an application for review of a judgment of a small Cause Court was held to be governed by the 90 days' rule under Article 173 see *Madon Mohan v Purno Chandra* 10 Cal 297 (298).

An application for review of judgment of a small Cause Court is required to be accompanied with the deposit of costs according to the provisions of sec 17 of the Prov S C C Act. If the application for review of judgment is made within the period of limitation, but the deposit is

made along with the application, the Court will not allow the deposit to be made after the period of limitation, unless sufficient cause is shown for the delay (sec 5) If no such cause is shown, the application for review of judgment will be dismissed as time barred—*Abdul Sheikh v Md Ayab*, 24 C W N 380, 56 Ind Cas 551, 31 C L J 197

162 —For a review of judgment by any of the High Courts of Judicature at Fort William, Madras, Bombay, Patna, Lahore and Rangoon in the exercise of its original jurisdiction Twenty days The date of the decree or order.

658. The judgment of a High Court in the exercise of its matrimonial and insolvency jurisdiction is a judgment of the High Court in its original jurisdiction—*Harrille King v James King*, 6 Bom 416 (434), *In the matter of Candas Narayandas*, 13 Bom 520, 533 (P C)

163 —By a plaintiff, for an order to set aside a dismissal for default of appearance or for failure to pay costs of service of process or to furnish security for costs Thirty days The date of the dismissal

Under Act XV of 1877, the words in column 1 ran thus: "By a plaintiff, for an order to set aside a dismissal for default"

659 Default —When the plaintiff is absent, and although a pleader for the plaintiff appears, he is instructed only to apply for an adjournment, and is unable to answer all material questions relating to the suit, his appearance is no appearance, and the dismissal of the suit after rejection of the application for adjournment, is a dismissal for default of appearance—*Lalla Prasad v Nand Kishore*, 22 All 66, 76 (F B), *Shankar v Radha Krishna*, 20 All 195, *Hinga v Munna*, 31 Cal 150 (151), *Soonderlal v Goorprasad*, 23 Bom 414 (422). Cf. *Satish Chandra v Ahara Prasad*, 34 Cal 403 (F B)

A plaintiff whose suit has been dismissed for default, under the Presidency Small Cause Courts Act may either apply for a new trial within

8 days under section 35 of that Act or may apply to have the order of dismissal set aside within thirty days under this Article—*Soonderlal v Govr Prasad* 23 Bom 414 (426)

Non appearance by reason of death is not default of appearance—*Debi Bahsh v Habib Shah* 16 O C 194 (P C) 17 C W N 829 19 Ind Cas 526 In such a case the Court is not competent to dismiss the suit for default of appearance and the plaintiff's representatives have six months (now 3 months) under Article 176 to be brought on the record—*Id* (overruling 14 Ind Cas 727 and 14 Ind Cas 711)

660 Limitation —An application under this Article must be made within thirty days from the date of dismissal. A mere notice of motion (given with 30 days) that the application would be made on a future date (which is beyond 30 days) will not prevent time from running—*Hinga v Munnna* 31 Cal 150 (154) *Rhetter Mohun v Kashinath* 20 Cal 899 If a vacation intervenes the application must be made on the date the Court re-opens and not on the first motion day after the vacation—*Hinga v Munnna* 31 Cal 150 (154) But according to the Rules of the Madras High Court an application to the Registrar of the original side to issue a notice of motion is an application within the meaning of this Article and will save limitation notwithstanding that the notice mentions a date beyond the thirty days as the date on which the application will be heard—*Kullayan v Elleppa* 17 M L J 215

Where a suit was dismissed for default on 19th December and an application to set aside the dismissal was made on the next day but the application was rejected on the 23rd January because the applicant failed to produce a copy of the judgment and decree as directed by the Court a second application for the same purpose made on the 16th February i.e. nearly two months after the dismissal of the suit was held to be barred—*Subba Row v Venkalaratnam* 22 Ind Cas 689 (Mad) But in an Allahabad case where an application for re-admission of a suit dismissed for default was made within 30 days but it was rejected because it was made by a person who held an invalid power-of attorney from the plaintiff a fresh application for the readmission of the suit presented by that person under a proper power-of attorney was granted though presented more than 30 days after the dismissal for default but within 30 days from the date of the first application—*Ajodhya v Chhabila* 20 Ind Cas 1004 (All)

The time during which the applicant had been erroneously prosecuting a suit to set aside the dismissal will be deducted under sec 14 (2) The ruling in *Shrofi Ram v Sheo Chand Rai* 63 P R 1886 (decided under Act XV of 1877) is no longer good law because under sec 14 (2) of the present Act the applicant is entitled to deduct the time spent in any civil proceeding (including a suit) and not merely the time spent in prosecuting an application

The period of time prescribed in this Article can be enlarged by sec 4 *et seq*; if the last day of limitation is a holiday, an application presented on the reopening day will be within time. But the day of closing of the wrong Court in which the application was erroneously filed will not be deducted—*Hano Mal v Hano Mal* 55 Ind Cas 55 (Lah)

If an applicant fails to apply within the period prescribed by this Article he cannot evade the law of limitation by calling his application, which is in reality an application for setting aside a dismissal for default an application for review of judgment—*Nur Mahammad v Dina* 15 P R 1897 But see *Fateh Chand v Menghi Bai* 109 P R 1913 19 Ind Cas 481 where the Court held that it had power to entertain the application for review under the above circumstances. Cf also *Raj Narain v Ananga Mohan* 26 Cal 598

The period prescribed by this Article cannot be extended under section 5—*Mahadeo v Lakshminarayan* 49 Bom 839 A I R 1925 Bom 521 *Ma Naw v Somasundaram* 2 Rang 655 *Sahib Ditta v Roda* 83 P R 1902

164 —By a defendant, for an order to set aside a decree passed <i>ex parte</i>	Thirty days	The date of the decree, or where the summons was not duly served when the applicant has knowledge of the decree
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Change —In column 1, the word 'judgment' in the old Act has been changed into decree and the words in column 3 stood thus 'The date of executing any process for enforcing the judgment'

661 Old Act and new —Where an application to set aside an *ex parte* decree was barred by the provisions of Art 164 of the Act of 1877, long before the Act of 1908 was passed the provisions of the new Act cannot revive the right to apply for setting aside the decree—*Nepal Chandra v Niroda Sundari* 39 Cal 507 (509)

If a decree was passed *ex parte* while the old Act was in force and the application was made after the Act of 1908 came into operation the latter Act would apply because the law to be applied to an application is the law existing at the time when the application is made—*Jia Bibi v Ilal* 37 All 597 (600) *Manohar v Sadiqa* 101 P R 1916 *Zaibunissa v Ghulam*, 70 P L R 1911 10 Ind Cas 823 *Chidambaram v Karuppan* 35 Mad 678 (679) *Bas ruddin v Sonaula* 15 C.W.N 102 (105)

A decree was passed *ex parte* against a minor in 1894 he became a major on the 11th January 1909 and applied on the 25th January to set aside the decree. The application would be governed by Art 164 of the Act of 1908 and would be barred. The plea of minority was available under the

Limitation Act of 1877 section 7 (which applied to *all* applications) but it would not now be available under section 6 of the present Act which applies only to applications *for execution*—*Chidambaran v Karuppan* 35 Mad 678 (679) 8 Ind Cas 513 *Manohar v Sadiga* 101 P R 1916 37 Ind Cas 29

662 Scope —The Article applies to any application (made under O 9 r 13 C P Code) which involves the setting aside of the original decree whether made to the original Court or to the Court of appeal after an appeal has been filed by the other defendants. In the latter case i.e. where the application to set aside the original decree passed *ex parte* is made to the appellate Court the application falls under this Article and not under Article 160. This latter Article applies only to applications for rehearing of an *appeal* heard *ex parte*—*Sankara Bhatta v Subraya* 30 Mad 535 (536)

An application to set aside an *ex parte* decree passed by a Presidency Court of Small Causes falls within the terms of sec. 108 of the C P Code 188* (O IX r 13) and the period of limitation for such an application is 30 days as prescribed by this Article and not 8 days as prescribed by sec. 37 of the Presidency Small Cause Courts Act—*Roshanlal v Lachmi Narayan* 17 Bom 507 (509)

This Article applies not only to an application for setting aside *ex parte* decrees but also to an application for setting aside *ex parte orders in execution proceedings* which come under section 47 C P Code because such orders are treated as decrees—*Subbia Naicker v Ramanathan* 37 Mad 462 (473) 26 M L J 189 22 Ind Cas 899

This Article is not restricted to applications to set aside a decree passed in a *suit*. Where a person was served with a notice to appear on a certain date and to show cause why the award passed against him should not stand filed and on his failing to appear on that date the award was ordered to be filed an application by that person to set aside the order passed *ex parte* falls under this Article. This Article applies to applications for setting aside *ex parte orders* passed in proceedings other than suits—*Fleming Shaw & Co v Mangalchand* A I R 1924 Sind 56 75 Ind Cas 1035

Where the plaintiff brings a *suit* to set aside an *ex parte* decree not merely on the ground that it was passed without service of summons but also on the ground that it was obtained by fraud Article 164 cannot apply (as it refers only to an *application*). The suit falls under Article 95—*Moti Lal v Russick Chandra* 26 Cal 326 at p 333 (footnote)

663 Defendant —In a probate application the mere citing of a person does not make him a defendant. Under section 83 of the Probate and Administration Act the cause must be contentious and the person cited must appear to oppose the grant of probate, before he becomes a defendant. If such person does not appear and the probate is granted *ex parte* it cannot be said that an order is passed *ex parte* against a defend-

and this Article cannot apply to an application by such person for revocation of the probate—*Saroja v Abhoy Charan* 41 Cal 819 (823) 24 Ind Cas 27

664 *Ex parte decree* —A payment order made *ex parte* under sec 150 of the Companies Act (1882) is not a *decree* and this Article does not apply to an application for setting it aside—*Hindusthan Bank Ltd v Mehraj Din* 1 Lah 187 (191) 55 Ind Cas 820

There is no distinction between a case decided *ex parte* by reason of the non appearance of the defendant at the *first* hearing and a case decided *ex parte* by reason of the absence of the defendant at an *adjourned* hearing. In both cases the defendant may apply to set aside the *ex parte* decree—*Jonardan v Pamdhone* 23 Cal 738 F B (overruling *Sital v Heera* 21 Cal 269) *Murappan v Belayan* 31 Mad 505 (506) *Hildreth v Sayaji* 20 Bom 380

When on the day of hearing the defendant appears in person but only for the purpose of applying for adjournment and the application is refused and a decree follows such decree is not an *ex parte* decree because the defendant cannot be said not to have appeared—*Soonderlal v Goor Prasad* 23 Bom 414 (421) but if the defendant is absent and a *pleader* on his behalf applies for an adjournment and the pleader has no other instructions but to get an adjournment and is unable to answer all material questions relating to the suit the defendant cannot be said to have put in appearance and if the application is refused the decree which follows is an *ex parte* decree—*Ibid* (at p 422) *Cooke v Equitable Coal Co Ltd* 8 C W N 621 (624) *Pamtahal v Rameshar* 8 All 140 *Shankar v Radha* 10 All 195 *Ramanuja v Rangaswamy* 18 M L J 51

665 *Limitation* —A decree was passed *ex parte* while the defendant was in jail. Five years afterwards the defendant applied to set aside the decree. It was held that if the application was treated as one for setting aside an *ex parte* decree then it was barred by limitation but if it was treated as an application for review of judgment the Court should decide the question whether the applicant had shown sufficient cause for not applying earlier—*Janki v Parmeswar* 13 A L J 482 29 Ind Cas 975

The mere fact that a party has not applied to set aside the *ex parte* decree within 30 days is no bar to his applying for review of judgment—*Chokkalingan v Lakshmanan* 38 M L J 224 55 Ind Cas 444 *Lala Chel Narain v Rampal* 16 C W N 643. *Contra* —*Deodip v Gopal Singh* 1 P L J 547 *Sant v Arjun* 13 Ind Cas 318 *Lal Devi v Amar Nath* 57 Ind Cas 15 (Lah) and *Shalaksha v Hugh Hogarih* 12 Bom L R 886 where it has been held that a party who has not applied to set aside the decree within 30 days cannot evade the law of limitation by calling his application an application for review of judgment.

If an application to set aside an *ex parte* decree which was made in time was consigned to the record room that fact does not in any way

necessitate a fresh application and a subsequent application must be considered as merely in continuance of the suspended original application. Consequently no question of limitation arises—*Barkatullah v Fu'l Maula*, 55 Ind Cas 824 826 (Lahore)

The third column of Articles 164 and 169 should be compared with that of Articles 163 and 168. In the case of a plaintiff or appellant seeking to set aside an *ex parte* decision limitation runs only from the date of the order whereas if a defendant or respondent seeks such relief, he can in cases where he has not had due notice count limitation from the date of his knowledge of the order—*Bissa Mal v Kesar Singh* 1 Lah 363 (364) 58 Ind Cas 739

The words 'where the summons was not duly served' in the 3rd column seem to refer to the summons given for the first hearing of the suit, so where there has been due service of such summons the mere fact that the defendant has not received notice of an adjourned hearing will not cause limitation to run from the date on which the defendant becomes aware of the decree having been passed—*Lal Devi v Amar Nath*, 57 Ind Cas 15 (Lah), *Suryit Singh v Torrie* 76 Ind Cas 14 A I R 1924 Lah 666

In computing the period of limitation the time taken in prosecuting an infraction proceeding in a wrong Court can be deducted—*Basiruddin v Sonaula*, 15 C W N 102 (106)

The period of limitation prescribed by this Article cannot be extended by the Court in the exercise of its inherent powers under sec 151 C P Code—*Ajodhya Mahlon v Phul Koor*, 1 Pat 277 A I R 1912 Pat 479 65 Ind Cas 341

Except in Madras, the period prescribed by this Article cannot be extended under sec 5 for sufficient cause, see Note 41 under sec 5 at p 27 ante

The time cannot be extended under sec 6. See 35 Mad 678 cited in Note 661 above

'Duly served'—A summons is said to have been duly served within the meaning of the 3rd column of this Article, if it was served in such a manner that the defendant had knowledge of the suit or that the Court may presume that he had such knowledge (O V, r 19) even though it was not served in sufficient time to enable him to appear and answer on the day fixed in the summons—*Kasarchand v Lalhami* 11 S L R 71, 42 Ind Cas 611, *Kasarchand v Lalhami*, 8 S L R 153 27 Ind Cas 351

Where the plaintiff knew that the defendant did not ordinarily reside in his ancestral house, and yet insisted upon the service of summons at that place, held that the summons was not duly served—*Kumud Nath v Jolindra Nath*, 38 Cal 394 (400). Where the plaintiff took out substituted service upon allegations which were false the notice could not be said to have been duly served—*Ram Kishen v Muta* 69 Ind Cas 467 (Lah). But where substituted service has been lawfully made (e g where substituted service was directed by the Court after satisfying itself that the

dant was keeping out of the way to evade service) the summons is said to have been duly served, and time under this Article runs from the date of the decree, even though the summons does not come to the knowledge of the defendant—*Dattu Ram v Nawab*, 26 P L R 704, A I R 1925 Lah 639, 92 Ind Cas 272

Where a summons was sent by registered post to the defendant, and he wired to the Court for an adjournment which was refused, and an *ex parte* decree was passed, *held* that the summons had been duly served, and time ran from the date of the decree—*Ghanshi Ram v Missri Lal*, 27 Bom L R 690, A I R 1925 Bom 444, 89 Ind Cas 223

A summons is said to be duly served on a firm, if it is served on any one of the partners of the firm, and time runs from the date of the decree—*Adiveppa v Paragji*, 26 Bom L R 388, A I R 1924 Bom 366

666 Knowledge of the decree.—This expression means a knowledge of the fact that a decree of the kind is in existence, but it does not embrace a knowledge of the contents and general effect of the decree—*Abdool Hoosein v Esmatji*, 12 Bom L R 462 But the words of the Article mean something more than a mere knowledge that a decree has been passed in some suit in some Court against the applicant. It means that the applicant must have knowledge not merely that a decree has been passed by some Court against him, but that a particular decree has been passed against him in a particular Court in favour of a particular person for a particular sum. It was not intended by the Legislature to lay down that the period under this Article would begin to run from the time the judgment debtor might have received some vague information that a decree had been passed against him—*Bapurao v Sadhu Bhivba*, 47 Bom 485 (487), 25 Bom L R 74, A I R 1923 Bom 193, *Kumud Nath v Jatindra*, 38 Cal 394 (403) Further, it must appear that the petitioner himself had a knowledge of the decree in the suit. Where the petitioner's brothers had knowledge of the *ex parte* decree passed against the petitioner, it cannot be reasonably inferred that the petitioner himself had a similar knowledge of it, particularly when it is proved that he lived away from his brothers who never communicated the fact of the decree to him—*Kumud Nath v Jatindra Nath*, 38 Cal 394 (403), 15 C W. N 399, 9 Ind Cas 189

In an application under this Article the burden of proving want of knowledge of the decree till within 30 days before the application is on the applicant—*Piroj Shah v. Qarib Shah*, 7 Lah 161, A I R 1926 Lah 379, 95 Ind Cas 124, *Sugru Mal v Sham Lal*, 146 P R 1918, 46 Ind Cas 777.

667. Application by legal representative of defendant:—Where a defendant against whom an *ex parte* decree has been passed dies an application by his legal representative (whether he has been brought on the record or not) to have the decree set aside must be made within the time

allowed by this Article Art 181 will not apply The word defendant in this Article is wide enough to include the legal representative of the original defendant The period of limitation runs from the date of the decree as the summons was duly served on the original defendant The alternative date mentioned in the second part of column 3 (*viz* the date of knowledge of the decree) applies only where the summons was not duly served on the original defendant — *Venkatasubbier v Krishnamurthi* 38 Mad 442 (443 444)

[As stated before the period of limitation under the Act of 1877 ran from the date of executing any process in enforcement of the judgment The rulings in *Hanmant v Shankar* 31 Bom 303 *Bhoobanessury v Judoendra* 9 Cal 869 *Pooroo v Prosonno* 2 Cal 123 *Slah Muhanmad v Hanmant* 20 All 311 *Sunraj v Arubika* 6 All 144 *Har Prasad v Jafar Ali* 7 All 345 *Rajah Ali v Upper India Paper Mills* 15 O C 289 decided with reference to the starting point of limitation under the old Act are no longer of any importance]

165 — Under the Code of Civil Procedure 1908	Thirty days	The date of the dispossession
by a person dispossessed of immovable property and disputing the right of the decree holder or purchaser at a sale in execution of a decree to be put into possession		

668 This Article contemplates the case of a person *other than the judgment-debtor* who applies to be restored to possession under O XXI r 100 of the C P Code Where therefore a judgment-debtor applies to be restored to possession of property seized by the decree holder in excess of what has been decreed the application falls under section 47 of the Code and is governed by Art 181 of this Act — *Abdul Karim v Islamunnissa* 38 All 339 (344) 14 A L J 401 *Bahir Das v Girls* 67 Ind Cas 663 A I R 1923 Cal 287 *Vachali Rohini v Kombi Aliassan* 42 Mad 753 (760) F B (overruling *Ratnam Ayyar v Krishna Dass* 21 Mad 494) *Rasul v Amina* 46 Bom 1031 (1036) 24 Bom L R 771 68 Ind Cas 349 *Sharju v Mir Khan* 1 Lah L J 230 *Maung Tha v Ma Pyn* 46 Ind Cas 323 (Bur) The contrary view is taken in *Har Din v Lachman* 25 All 343 and *Rajaram v Itraj Kunwar* 17 O C 94 24 Ind Cas 137 where an application by a judgment debtor has been held to fall under Article

166—Under the same Thirty The date of the sale.
Code to set aside a sale days
in execution of a decree .

Thus Article corresponds to Arts 166 and 172 of Act XV of 1877

669 Scope —The scope of this Article is something wider than that of Arts 166 and 172 of the Act of 1877 taken together, it applies to all applications under the C P Code for setting aside an execution sale

Art 166 of the old Limitation Act applied only when the application was made on the ground of irregularity in publishing or conducting the sale (O 21 r 90) or on the ground that the decree holder purchased without the permission of the Court (O 21 r 72) and Art 172 applied only where the ground of setting aside the sale was that the judgment debtor had no saleable interest in the property

But if the sale was sought to be set aside on any other ground the application fell under Art 178 (i.e. 181 of this Act) Thus if the sale was sought to be set aside on the ground that it was brought about by fraud Art 178 and not Art 166 applied—*Nemai v Deno* 2 C W N 691 *Sakharam v Damodhar* 9 Bom 468 *Sarat v Nemai* 5 C W N 763 *Bhuban Mohun v Nunda Lal* 26 Cal 324 *Purna Chandra v Anukul* 36 Cal 654 (656) so was the case if the sale was sought to be cancelled on the ground that notice was not served on the judgment-debtor as required by section 248 C P Code (O 21 r 22)—*Livinia Ashlou v Madhubmoni* 14 C W N 560 *Lakshmi v Srish* 13 C L J 162 or on the ground that the judgment debtor had purchased the property in contravention of the provision of law—*Chand Monce v Sarla Monce* 24 Cal 707 (710)

But now the present Article is quite general in its terms and is not restricted to applications under O 21 rules 72 and 89 to 91 it is comprehensive enough to cover all applications under the C P Code for setting aside execution sales on any ground whatsoever An application under the C P Code to set aside a sale in execution of a decree falls under this Article even though the application falls under sec 47 C P Code and not under O 21 rule 90—*Ramdhari v Deonandan* 2 Pat 65 3 P L T 501 A I R 1922 Pat 507 *Ganapathi v Krishnamachariar*, 43 M L J 184 *Ma Pwa v Ma Tambi* 1 Rang 533 A I R 1924 Rang 124 *Haripada v Barada Prosad* 51 Cal 1014 A I R 1924 Cal 351 This Article applies to an application to set aside a sale on the ground that the personal property of the applicant was sold in execution of a decree against the applicant's father—*Satis Chandra v Nishi Chandra* 46 Cal 975 (977 978) 54 Ind Cas 431 it applies to an application to set aside a sale on the ground that the sale took place contrary to the directions given in the decree—*Muthia Chettiar v Bava Sahib* 27 M L J 605 it applies where the execution sale is sought to be set aside on the ground of fraud—*Arjun v Gunendra*

18 C. W. N. 1266 2nd Ind Cas 294 *Rai Kishori v Mukunda* 15 C. W. N. 965 *Ganapathi v Krishnamachari* 43 M. L. J. 181 A. I. R. 1922 Mad 417 *Ramdhari v Deonandan* 2 Pat. 65 3 P. L. T. 501 it applies to an application to set aside a sale on the ground of irregularity in the service of notice under O. 21 rule 2—*Das v Viraj* 11 V. Mir *Mahammad* 6 P. L. J. 319 (326) or on the ground that there was no attachment prior to the sale or that there had been a defective attachment—*Ma Pwa v Md Tambi*, 1 Rang 533

An application made after the present Act of 1908 came into operation to set aside a sale held prior to that Act on the ground of fraud is governed by Art. 166 of the present Act and not by Art. 178 of the Act of 1877. Section 6 of the General Clauses Act does not preserve the right of the applicant to apply within three years of the date of sale which he had under Art. 178 of the old Act—*Das Kishori v Mukunda* 15 C. W. N. 965 (971) *Ganapathi v Krishnamachari* 43 M. L. J. 181 70 Ind Cas 743

Under the C. P. Code 1882 if the auction purchaser failed to obtain possession of the property purchased owing to the judgment-debtor having no saleable interest in the property the purchaser was entitled under section 315 of that Code to receive back the purchase money and an application for the refund of the money was governed by Article 178 of the Limitation Act of 1877 the purchaser was not required to make any application for setting aside the sale as contemplated by Article 172 of the Act of 1877. But the law has undergone a change after the passing of the C. P. Code of 1908. Under this Code a purchaser who fails to obtain possession of the property purchased on account of the judgment-debtor having no saleable interest in the property is required to make an application under O. 21 rule 91 to set aside the sale and then when the sale is set aside to make another application for refund of the purchase money under O. 21 rule 93. The first application is governed by Article 166 of the present Limitation Act, and the second application by Article 181—*Makar Ali v Sarfuddin* 50 Cal. 115 (at pp. 120 122) 27 C. W. N. 183

Under O. 21 rule 89 of the C. P. Code the judgment-debtor may obtain reversal of the sale by deposit of money in Court such deposit must be made within thirty days from the date of sale as provided by this Article—*Chaudhury Rameshwar v Chaudhury Sureshwar* 2 P. L. J. 164 (165). But it should be remembered at the same time that the mere deposit of money required by O. 21 r. 89 of the C. P. Code cannot by itself be treated as an application to set aside the sale. There must be a separate application along with the deposit. If the deposit is made within 30 days but the application is made beyond the period it is barred—*Ram Autar v Sheo Peary* 12 O. L. J. 137 A. I. R. 1925 Oudh 411 *Mathura v Ram Lal* 9 Ind Cas 33 (All). See also *Parath Vetti v Ambulath Vetti* 32 Ind Crs 45 (Mad) and *Sarout Begam v Harder Shah* 9 A. L. J. 12 13 Ind Cas 404

This Article refers to applications under the *C P Code*. An application to set aside a sale conducted by the Insolvency Court in realising assets of the insolvent under sections 20 and 23 of the Provincial Insolvency Act (III of 1907) is governed by Article 181 and not by this Article—*Mir Afzal Ali v Mir Asman Ali* 107 P L R 1914 23 Ind Cas 397 (But Article 181 cannot apply since that Article is also restricted to applications under the *C P Code*) So also an application to set aside a sale under sec 47 of the Chota Nagpur Tenancy Act is not governed by this Article but by the special provision of sec 231 of that Act—*Nilmoney v Roban Majhi* 1 P L J 483 (484) 20 C W N 1243 But an application under sec 173 Bengal Tenancy Act to set aside a sale in execution of a rent decree is cognizable under sec 47 *C P Code* and attracts the operation of Article 166 of the Limitation Act—*Haripada v Barada Prasad* 51 Cal 1014 A I R 1925 Cal 351 82 Ind Cas 322 But see *Chandmonee v Santomonee* 24 Cal 707 where Article 181 was applied

670 *Void sales*—If the execution-sale is not binding on the judgment debtor or is made without jurisdiction or is an absolute nullity this Article does not apply—*Payidanna v Lakshminarasamma* 38 Mad 1076 *Shreebas v Yesu* 43 Bom 235 *Seshagiri v Srinivasa* 43 Mad 313 (315) *Joggeswar v Jhapal Santal* 51 Cal 224 (229) *Samandam v Malikandi* 26 M L J 267 23 Ind Cas 251

Thus if the judgment-debtor was not a party to the suit and was not sufficiently represented by any one in the suit the sale is not binding on him and does not require to be set aside either by a suit under Article 12 or by an application under Article 166—*Payidanna v Lakshminarasamma* 38 Mad 1076 (1081) If the property of the defendant is exonerated by the decree from liability a sale of his property held in execution of the decree is void and an application by the defendant to set aside the sale would be governed by Article 181 not by this Article—*Seshagiri v Srinivasa* 43 Mad 313 (315)

The plaintiff obtained an *ex parte* decree for Rs 86 against the defendant in 1906 and in execution thereof the defendant's house was sold and purchased by the plaintiff in 1910 Subsequently the defendant succeeded in getting the *ex parte* decree set aside and in having the case retried but the result was a decree passed in 1914 in plaintiff's favour for Rs 87 The defendant paid up the amount of the second decree and applied to have the previous sale set aside It was held that the previous sale held under the previous decree which was set aside should be treated as a nullity as having been no longer based on any solid foundation and that the application was governed by Article 181 not by this Article and was quite in time—*Shreebas v Yesu* 43 Bom 235 (239) 48 Ind Cas 130

But a sale held without notice of sale proclamation being given to the judgment-debtor is not a nullity and an application to set it aside is

governed by this Article—*Veethi v Subramania* 31 L W 59 1919 M W 589 53 Ind Cas 509

So also where the proclamation of sale was not published in the village in which the property was situate the omission was an illegality but such illegality did not make the sale a nullity and an application by a judgment-debtor to set aside the sale is governed by Article 166 and not by Article 181—*Paramasiva v Pulukaruppa* 47 Mad 525 45 M L J 829 The mere fact that there was an illegality in the procedure does not make the sale null and void Article 166 applies to every application to set aside a sale whether the ground for seeking to set aside the sale is the commission of an irregularity or an illegality—*Ibid* (at p 529) In this case Spencer J warned against the common practice of stigmatising any and every illegal or irregular sale as a nullity and remarked (at p 530)

It is not uncommon to hear a sale described as a nullity if there is an illegality affecting the jurisdiction of the executing Court and illegalities are commonly supposed to take applications to have sales set aside out of the scope of O XXI rule 90 Ever since the Privy Council in *Malkarjun v Narkari* (25 Bom 337) distinguished between a total absence of jurisdiction and an erroneous working out of a valid decree against an estate after its owner's liability is established there should be no room for misconception But unfortunately it is not uncommon to hear the expression nullity indiscriminately applied to sales by Court as if by that magic word the statute of Limitations was abolished

Where the notice under O XXI rule 12 has not been issued to the judgment-debtor in respect of an execution application filed more than a year after the decree a sale held in execution is not merely voidable but void as against the person to whom notice should have been but was not issued such a sale does not require to be set aside but if a party files an application to set aside the sale either under sec 47 C P Code or otherwise the application is governed by Article 181 not by Article 166 The party may also file a suit to recover the property within 12 years (Art 144)—*Rajagopala v Ramanaiahachariar* 47 Mad 288 304 (F B) 46 M L J 104 A I R 1924 Mad 431 disapproving *Viswanathan v Somasundaram* 45 Mad 875 where such omission was held to be only a material irregularity not invalidating the sale

A sale held in contravention of the terms of O 34 rule 14 is not void but voidable and an application to set aside the sale must be made under this Article within thirty days from the date of the sale Even if the property is purchased by a third party and not by the mortgagee himself, the purchaser cannot bring a suit to set aside the sale but can only make an application (sec 47 C P Code) to set aside the sale and the application will fall under Article 166—*Bhaichand v Ranchhodas* 45

671 Limitation —Under the plain language of this Article the period of limitation runs from the date of sale, and not from the date of confirmation of the sale—*Silarani v Asaram* 19 N L R 162, *Vana v Ratilal* 28 Bom L R 510, *Wasudeo v Hirralal* 8 N L R 177 17 Ind Cas 884 The remark made by Oldfield J in *Tirumalaisami v Subramanian* 40 Mad 1009 (at p 1015) that the period of limitation under Article 166 is thirty days from the date of confirmation of the sale is not correct It is a mere obiter not necessary for the decision of the case

If a sale took place on a certain date but the sale officer did not make a declaration on that date as to who was the purchaser but gave the information on a subsequent date it is the latter date which must be taken as the date of sale The mere making of a bid does not conclude the sale For the conclusion of a sale it is necessary for the sale officer to accept the final bid and to make a declaration as to who is the purchaser and to order him to pay over 25 per cent of the purchase money—*Munshi Lal v Ram Narain* 35 All 65 17 Ind Cas 783

In computing the period of limitation the time during which the applicant had been prosecuting a suit in good faith will be deducted under sec 14—*Ganapathi v Krishnamachari* 43 M L J 184 A I R 1922 Mad 417

672 Fraud —If fraud is proved the applicant is entitled to the benefit of sec 18 that is the period of limitation runs from the date when the fraud first became known to the applicant—*Arjun v Gunendra* 18 C W N 1766 (1271) *Ramdhari v Deonandan* 3 P L T 501 2 Pat 65 But in order to entitle the applicant to get the benefit of section 18 he must show not only that there was fraud, but that he was by reason of the fraud kept from the knowledge of his right to make the application See the cases cited under sec 18 at page 135 ante Limitation runs from the date when the fraud first becomes known and it is immaterial that the sale has been confirmed before that date in ignorance of the fraud—*Mohendra v Gopal* 17 Cal 769 (dissenting from *Gobind v Umacharan* 14 Cal 679) *Gulam v Judhasthir* 30 Cal 147 (153) *Sheo Ram v Ikramunnissa* 45 All 316 A I R 1923 All 282 See Note 172 under sec 18

673 Application by minor —Under the present Limitation Act a minor entitled to make an application for setting aside a sale is not given the privilege of sec 6 (which now applies only to an application for execution of a decree) but under the old Limitation Act he was entitled to such privilege And a right which accrued to a minor judgment-debtor under the Act of 1877 to apply after attaining majority to set aside a sale which took place before the Act of 1908 came into force is not taken away by the coming into operation of the latter Act that being a privilege which has been preserved by sec 6 (c) of the General Clauses Act—*Fazl Karim v Annada* 15 C W N 845 (847)

167—Complaining of resistance or obstruction to delivery of possession of immovable property decreed or sold in execution of a decree	Thirty days	The date of the resistance or obstruction
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674 Scope.—The application contemplated in this Article is an application under O 21 r 97 of the C P Code

A minor applicant was entitled under the Act of 1877 to make an application under this Article within one month of his attaining majority—*Unayak Rao v Dev Rao* 11 Bom 473 (474) But the present Act gives no such privilege to a minor as section 6 is restricted to applications for execution of decrees and does not like the corresponding section of the old Act apply to all applications

If an application made beyond the thirty days prescribed by this Article is admitted no appeal lies against the order of admission but in an appeal against the final order passed under sec 321 C P Code 1882 (now O 21 rule 99) the order of erroneous admission of the time barred application can be objected to and the Appellate Court is bound to entertain the objection and to dismiss the application if it is found to have been wrongly admitted by the Lower Court—*Lala v Narayan* 21 Bom 39* (393)

It is not obligatory upon the purchaser or the decree holder to proceed to make an application complaining of resistance The option rests with him to pursue his remedy either summarily by an application under section 328 C P Code 1882 (now O XXI r 97) or by a regular suit complaining of the obstruction and seeking possession The two remedies are concurrent and the fact that he has not made an application within 30 days under Article 167 is not a bar to his filing a regular suit—*Balwant v Babaji* 8 Bom 60* (608) If the purchaser omits to make an application within thirty days as prescribed by this Article he can bring a suit for possession provided it is brought within twelve years from the date of his purchase—*Shuteenath v Obhoy* 5 Cal 331 (333)

If the decreeholder purchaser makes an application within 30 days after the resistance the application may be registered as a regular suit under sec 331 C P Code and the rights of the parties will be determined as if an ordinary suit for possession has been instituted by the decree holder against the defendant (under Article 138 or 144)—*Namdev v Ramchandra* 18 Bom 37 (40) But if the decreeholder makes the application more than 30 days after the date of resistance the application cannot be registered as a suit but the decreeholder may file a regular suit—*Valliammu v Shanmugam* 7 M L T 223 6 Ind Cas 285

In Madras, it has been laid down that even though the decreeholder or purchaser makes no application under Article 167 (complaining of resistance) within 30 days from the date of resistance, he is entitled to make an application for *delivery of possession*, the limitation period of which is three years (Art 180)—*Mulla v Appasami*, 13 Mad. 504 (507), followed in *Abdul Karim v Timmaraya* 24 Ind Cas 512 (Mad) But the Allahabad and Bombay High Courts are of opinion that the failure to apply within 30 days of the date of resistance is a bar to an application for delivery of possession, because such application is virtually an attempt to renew the old proceedings which were allowed to fall through, and that the only remedy of the decreeholder is a regular suit for possession—*Kesri Narain v Abul Hasan*, 26 All 365 (367) 1 *Vinayakrav v Devrao*, 11 Bom 473 (474)

Fresh resistance —Where at first there was an obstruction, but no application was made by the decreeholder within 30 days from the date of the obstruction, and then the decreeholder applied for and obtained a fresh warrant for possession, but was *again resisted*, held that the decreeholder was entitled to make an application under Article 167 within one month from the date of the *second* resistance, though more than one month after the first resistance The fact that no application was made within 30 days of the first resistance did not bar the present application—*Rama sekhar v Dharmaraya*, 5 Mad 113 (114) Where the decreeholder applied for possession of 19 shops decreed to him but being resisted made an application complaining of the resistance, and the Court ordered that the decreeholder be put in possession of 15 out of 19 shops, and then the decreeholder having applied for possession of the remaining 4 shops, he was again resisted, and again made an application complaining of the resistance within 30 days from the date of the second resistance, held that the application was not barred—*Narain Das v Hazari Lal*, 18 All 233 (237), following 5 Mad 113

Where the original resistance was by a third person, and no application was made by the purchaser under Article 167 within 30 days of the resistance, and then the present obstruction is made by the judgment-debtor himself (who does not claim in any way through the third party who was the original obstructor) the purchaser may make an application for delivery of possession within 3 years of the second resistance—*Vinayakrav v. Devrao*, 11 Bom 473 (475).

168 —For the readmission of an appeal dismissed for want of prosecution,	Thirty days	The date of the dismissal.
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675 Scope.—This Article applies where the appeal is dismissed under the C. P. Code, and not where it is dismissed under a Rule of Court Thus, where an appeal is dismissed under Rule 17 of the Rules of the High Court,

Part II, Ch VIII for failure to deposit the estimated amount of costs for the preparation of the paper book an application for re-admission of the appeal does not fall under this Article—*Pamlatiya Mahajan Mohan* 23 Cal 339 (347)

This Article is no application where the order of dismissal is *interdicta*—*Asa Mahomed v. Shaukat Durr* 69 Ind Cas 118 (Lah)

This Article refers to an application under O 41 rule 10 of the C P Code under which if sufficient cause is shown for default the Court is bound to re-admit the appeal—*Sunil v. Shrinivas* 45 Bom 618 (632) 23 Bom L R 110 But an application for the re-admission of an appeal dismissed for failure to give security for costs under O 41 rule 10 of the C P Code does not fall under this Article—*Gohari Bibi v. Nafar Ali* 28 C L J 163 40 Ind Cas 231

Time runs under this Article from the date of dismissal of the appeal, and not when the appellant has knowledge that his appeal has been dismissed—*Bissa Mat v. Kesar Singh* 1 Lah 363 (364) A comparison between Arts 163 and 163 on the one hand and Arts 164 and 169 on the other will show that while for a plaintiff or appellant seeking to set aside an *ex parte* decree or order limitation runs only from the date of the decree or order, the starting point of limitation in case of a defendant or respondent seeking such relief where he has not had due notice is the date of his knowledge of the decree or order—*Ibid*

The provisions of section 6 do not apply to an application under this Article—*Sonubai v. Shivajirao* 45 Bom 648 (653)

The period of limitation prescribed by this Article cannot be extended under sec 5 on any ground whatsoever—*Krishnasami v. Chengalroya* 47 Mad 171 76 Ind Cas 886 A I R 1924 Mad 114 *Mahli v. Jiwan* 141 P R 1879 And so after the expiry of 30 days from the date of the dismissal the order of dismissal becomes final If after the expiry of 30 days the appellant applies for re-admission of the appeal and the appeal is readmitted and heard all the proceedings subsequent to such application including the re-admission of the appeal must be set aside as invalid—*Kabir v. Khwaja Md Khan* 44 P R 1832

But though an application for readmission of the appeal is time barred under this Article it is open to the Court in a proper case to deal with the application under sec 151 of the C P Code in the exercise of the inherent powers of the Court and the period of limitation will have no application to the exercise of such powers—*Sonubai v. Shivajirao* 45 Bom 648 (653) But the Madras High Court dissents from this view in *Krishnaswami v. Chengalroya* 47 Mad 171 45 M L J 813 A I R 1924 Mad 114

Default of prosecution —If on the day fixed for the hearing of the appeal a pleader appears for the appellant but he cannot argue the case and applies for an adjournment on the ground that the main pleader engaged by the appellant has gone elsewhere *held* that the appearance of a pleader w

instructed only to apply for an adjournment is no appearance consequently if the application for adjournment is not granted and the appeal is dismissed such a dismissal amounts to dismissal for want of prosecution (and not a dismissal on the merits)—*Satish Chandra v Ahara Prasad* 34 Cal 403 (417) F B Cf *Lalla Prasad v Nanda Kishore* 20 All 66 and other cases cited in Note 659 under Article 163 Contra—*Patinhare v Vellur Krishna* 26 Mad 267

169—For the rehearing of an appeal heard <i>ex</i> <i>parte</i>	Thirty days	The date of the decree in appeal, or, where notice of the appeal was not duly served, when the applicant has know- ledge of the decree
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676 Change —The words or where notice decree have been added in 1908 in view of this change the case of *Venobachar v Raga vendrachar* 18 M L J 96 which decided that this Article had no application where the respondent had no notice of the appeal is no longer good law

677 Scope —This Article applies only to an application for the rehearing of an *appeal* heard *ex parte* An application to set aside an *original* decree which was passed *ex parte* falls under Article 164 and not under Article 169 even though the application is made to the appellate Court—*Sankara v Subraya* 30 Mad 535 (536)

This Article does not apply where the appeal was heard *ex parte* by reason of the nonappearance of the respondent owing to his *death* So if while the appeal was being heard the respondent *died* and an *ex parte* decree was passed in favour of the appellant the legal representative of the respondent would get the usual period of six [now three] months (Art 177) for applying to be brought on the record and Article 169 would not bar such application—*Daulai Rai v Jagat Ram* 96 P R 1918 47 Ind Cas 962

678 Starting point of limitation —Where notice has not been duly served the period of limitation runs from the time when the applicant has knowledge of the decree in appeal—*Daulai Rai v Jagat Ram* 96 P R 1918 47 Ind Cas 962

The Court has no power to extend the time prescribed by this Article—*Sher v Mohan Singh* 66 P R 1885

An application for rehearing of an appeal presented originally within the period of limitation but returned for amendment and again presented after amendment after the period of limitation cannot be rejected as out of time The amendment relates back to the original presentation—*Shama Prasad v Taki Mullik* 5 C W N 816 (817)

Where the application for rehearing of an appeal has been presented after 30 days the applicant cannot evade Article 169 by calling his application an application for review of judgment. Such a practice would make this Article a dead letter—*Santu v Arjun Das* 131 P W R 1912 13 Ind Cas 318. Cf *Lal Devi v Amar Nath* 57 Ind Cas 15 (Lah).

170—For leave to appeal as a pauper Thirty days The date of the decree appealed from

679. An application for leave to appeal as a pauper must be presented within 30 days as prescribed by this Article. Even if an appeal is at first presented within time on an insufficient Court fee and then on demand by the Appellate Court to pay full Court fee the appellant applies for leave to appeal as a pauper after the period of limitation prescribed by this Article the application will be barred—*Mahadev v Lakshman* 19 Bom 48 (50). So also where a memorandum of appeal was presented to the High Court within 90 days but beyond thirty days on an insufficient Court fee and upon demand made by the Court to pay the deficiency the appellant stated that he was unable to pay it and prayed that the memorandum of appeal should be treated as an application for leave to appeal as a pauper it was held that the memo of appeal not having been presented within 30 days as required by this Article could not be treated as an application for leave to appeal as a pauper—*Gali v Rachla Kunwar* 13 A L J 635 29 Ind Cas 1003.

Section 5 of the Act of 1877 was not applicable to an application for leave to appeal as a pauper so that the Court could not grant time on any sufficient cause—*Parbati v Bhola* 12 All 79. But under the present Act that section has been extended to an application for leave to appeal.

Where an application for leave to appeal as a pauper is refused the Court should grant a reasonable time to the appellant for paying the stamp duty on the memorandum of appeal and if he pays the Court fee within the time allowed the appeal must be deemed to have been filed as on the original date of presentation of the application for leave to appeal as a pauper—*Nallavadina v Subramania* 40 Mad 687 (697). The Limitation Act prescribes the same period of limitation by Arts 152 and 170 respectively for the filing of an appeal itself and for the filing of an application for leave to appeal as a pauper so that the result would often be that in every case where the pauper application happens to be refused there would be no time to file a regularly stamped appeal within the period of limitation. Therefore the Court while dismissing an application for leave to appeal *in forma pauperis* should grant time to the appellant within which to file his appeal and if he files his appeal within that period the appeal is in time—*Baigil v Dessai* 22 Bom 849 (856) see also *C v Lakshmi* 26 All 329.

171.—Under the Code of Sixty The date of the abatement
Civil Procedure, 1908, days
for an order to set aside
an abatement. e

Articles 171 and 172 of the present Act together correspond to Art 171 of Act XV of 1877

680 This Article did not originally occur in the Act of 1877 but was added by the Amendment Act XII of 1879 Prior to the introduction of this Article it was held that an application to set aside an order of abatement was governed by the three years' rule under Article 178 (now Article 181)—*Bhojrab v Doman*, 5 Cal 139 This decision must be deemed as overruled by this Article

An application to set aside an order of abatement must be made within sixty days under this Article, otherwise it will be barred—*Lakshmi Chand v Kachubhai*, 35 Bom 393 (395). *Bham Ram v Narain*, 1916 P W R 12, but the period of limitation under this Article may be extended if the applicant can show sufficient cause for the delay under sec 5 See C P Code, O 22 rule 9 (3) See also *Bham Ram v Narain*, (1916) P W R 12, 31 Ind Cas 697, and *Kandasami v Murugappa*, 16 M I T 547 26 Ind Cas 472 In 35 Bom 393 (395) the application of the son of the deceased plaintiff, who died after the decree for partition was passed but before the partition was carried out in accordance with the decree, to set aside the order of abatement was dismissed as it was presented beyond the period but the Court exercising its inherent powers to make such orders as may be necessary in the ends of justice, directed that he should be made a defendant, as it was a partition suit in which all parties should be before the Court and the presence of the deceased plaintiff's son was necessary in order to enable the Court to effectively conduct the partition proceedings

If no application for substitution is made within the period of six months (now three months) prescribed by Article 176 or 177, the suit will abate (vide O 22, r 4, C P Code), but it will be open to him to make an application under O 22 r 9 (2) to set aside the order of abatement (within 2 months from the date of abatement)—*Lakshmi Narain v Md Yusuf* 42 All 540 (541). *Secretary of State v Jawahir*, 36 All 235 (237) Where an application to set aside the order of abatement and to revive the suit was made by the legal representatives of the plaintiff more than six months (but within eight months) after the plaintiff's death, the proper procedure for the Court would be first to declare the suit to have abated, and then at once to pass an order setting aside the abatement and reviving the suit, if sufficient cause was shown for setting aside the order of abatement—*Ram Pratap v Lal Chand*, 9 C. W N 369 (370), *Fulbah v. Goculdas*, 9 Bom 275 (277); *Lakshmi Narain v Md Yusuf*, 42 All 540 (541).

681. Application by reversioner.—The nearest reversioner to the estate of a deceased Hindu instituted a suit to declare certain alienations made by the widow as void beyond her lifetime, and died pending the hearing. Within six months of his death and without hearing any others among the surviving body of reversioners, the lower Court passed an order declaring that the suit had abated. Nearly two years after, the next reversioner applied to set aside the abatement, to be brought on the record as the legal representative of the deceased, and to be allowed to continue the suit. *Held* that a suit brought by a reversioner is one really brought on behalf of the entire body of reversioners; if the reversioner dies, the next reversioner can continue it; the suit does not abate because the next reversioner must be deemed to have been already a party thereto; the present application to continue the suit is not an application to set aside the abatement (because the order of abatement is invalid and need not be set aside) but an application under O. 1, rules 1 and 8 (2), and is governed not by this Article but by Article 181.—*Krishnaswamy v. Seetalakshmi*, 1918 M. W. N. 858

172.—Under the same Code by the assignee or the receiver of an insolvent plaintiff or appellant for an order to set aside the dismissal of a suit or an appeal.	Sixty days.	The date of the order of dismissal.
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This was Article 171 of the Act of 1877.

173.—For a review of judgment except in the cases provided for by Article 161 and Article 162.	Ninety days.	The date of the decree.
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682. Before the enactment of Article 161, an application for review of a judgment of a Small Cause Court was governed by this Article; see *Madan v. Purna*, 10 Cal. 297 (298). Now it falls under Article 161.

This Article applies where a review and not a new trial, is the proper remedy.—*Ibid.*

An application for a review of the High Court's decree (appellate) must be presented within 90 days of the decree, and every day's delay in that period must be duly accounted for.—*Ramaswami v. V. Ramiah*, 3 L. W. 244, 32 Ind. Cas. 1000.

174—For the issue of a notice under the same Code, to show cause why any payment made out of Court of any money payable under a decree or any adjustment of the decree should not be recorded as certified. Ninety days When the payment or adjustment is made.

This Article corresponds to Art 173A of Act XV of 1877

683 The application referred to in this Article is an application under O XXI, rule 2 of the C P Code, made by the *judgment debtor*. This Article has no application where the *decree holder* takes steps to report satisfaction *suo motu*—*Gopal Das v Gangaram*, 1888 A W N 115. The decree holder may apply at any time for having the payment or adjustment certified to the Court—*Tukaram v Babaji*, 21 Bom 122 (124). A judgment-debtor who pleads payment or adjustment must issue notice upon the decree holder within 90 days of the payment or adjustment, before he can certify payment. But there is no corresponding obligation imposed upon the *decree holder*. He may certify payment at any time before execution or he may do so in his application for execution—*Eusufzaman v Sanchia*, 43 Cal 207 (210); *Sheikh Elahi v Nawab Lal*, 4 P L J. 159 (161); *Jatindra v Gagan Chandra*, 46 Cal 22 (24); *Balay Md v. Asjanmal*, 26 C W N 529, *Bahuballabh v. Jogesh*, 23 C W. N 320, 50 Ind Cas 242. *Bhajan Lal v Cheda Dal*, 12 A L J 825.

This Article applies to an application made by the representative of the judgment debtor. He is bound to apply within the period prescribed by this Article—*Panduranga v Vythilinga* 30 Mad 537 (540).

If the judgment-debtor makes any payment or adjustment towards the decree, but no application is made to get it certified within the period prescribed by this Article, the judgment debtor will not be entitled to obtain credit for those payments or to set up the payment or adjustment as a bar to the execution of the decree. He cannot evade the provisions of this Article by securing investigation of the same matter under section 47, C P Code during the execution proceedings—*Pandurang v Vasthilinga* 30 Mad 537 (540), *Golam Muzaffar v Goloks Charan*, 25 Ind Cas 884 (Cal), *Kutubulla v Durga Charan*, 16 C W. N 396 (397), *Mukunda Isl v Bansidhar*, 50 Cal 468 (473). *Nislarini v Kasim Ali* 12 C L J 65 7 Ind Cas 258, *Maroti v Narayan A I R* 1925 Nag. 374; *Jogendra v. Probhat*, 19 C W N 650 19 C L J 126 21 Ind Cas 926, *Monmohan v Dwaraka Nath*, 12 C. L J 312, *Kamini Devi v Aghore Nath*, 14 C W N

357. 11 C. L. J. 91. *Mulchand v Champa* 26 P. L. R. 250, 87 Ind. Cas. 635. If he were allowed to do so, the provisions of Article 174 would be rendered nugatory—*Kamini Devi v Aghore Kumar*, (supra); *Mukunda v Bansidhar*, (supra). But the Bombay High Court takes a contrary view. Thus in *Trimbal v Hari Laxman*, 34 Bom. 575 (580) Heaton J. observes that the special procedure provided by sec. 258 C. P. Code is not the only way in which the judgment debtor informs the Court of a payment or adjustment, what he does more often is that when the decree holder applies for execution, he (the judgment-debtor) pleads a payment or adjustment. In such a case the Court should enquire and decide whether that adjustment is proved, and if it is found to be proved the Court should treat it as an answer to the decreeholder's claim, and thus would be in consonance with the provisions of sec. 244 (now sec. 47) of the Code. If the Court is debarred from enquiring into the payment or adjustment on the ground that it is uncertified, the effect would be to encourage fraud on the part of the decree holder. The same view has been expressed in another Bombay case—*Hansa v Bhawa*, 40 Bom. 333 (336).

This Article refers to sec. 258 C. P. Code 1882 (=O. 21, rule 2 of the Code of 1908). And as that section applies only to money decrees and not to decrees for possession of immoveable properties, an application to record delivery of land made out of Court is not governed by this Article—*Sankaran v. Kanara*, 22 Mad. 182 (186). So also this Article does not apply where the decree is not a decree for payment of money but a mortgage-decree for sale in case the money due is not paid—*Mallikarjuna v Narasimha*, 24 Mad. 512 (514). Sec. 258 C. P. Code 1882 does not apply to an application made under sec. 89 Transfer of Property Act, therefore the limitation prescribed by this Article does not apply to any payment made before a final decree is made, and the defendant is not debarred from setting up the plea of payment—*Hatem Ali v. Abdul Gaffur*, 8 C. W. N., 102 (104). But see *Nistarani v Kasim Ali*, 14 C. W. N. 357.

Where under the terms of a decree the decree-holders remained in possession of the property, the amounts received by the decree holders were not 'money payable under a decree', consequently these receipts need not be certified to the Court within 90 days from the date in which they were received—*Yella Reddi v Syed Muhammadali*, 39 Mad. 1026 (1027), *Vaidhinathasamy v Somasundram*, 28 Mad. 473 (478) F. B.

175—For payment of Six The date of the decree.
the amount of a decree months.
by instalments.

This Article refers to an application made by the judgment-debtor under O. 20, rule 11 (2) of the C. P. Code

176—Under the same Ninety The date of the death
Code to have the legal days of the deceased
representative of a plaintiff or appellant
deceased plaintiff or of
a deceased appellant
made a party

This Article corresponds to Article 175A of the Act of 1877

684 By Sec 2 of the Indian Limitation and C P Code Amendment Act (XXVI of 1920) the period of limitation has been reduced from six months to ninety days But where an appellant had died before the Amendment Act came into operation his legal representative would get six months time under this Article as it stood before the amendment—*Ajit Singh v Bhagabati* 36 C L J 263 A I R 1922 Cal 491 70 Ind Cas 370

It is interesting to note the changes in the period of limitation This Article did not exist in the Act of 1871 and the period of limitation for the application was probably 3 years under the general Article It appeared for the first time in the Act of 1877 and the period allowed was sixty days then in 1888 the period was extended to six months This period was retained in the Act of 1908 until recently it has been curtailed to 90 days The same remarks apply also to Article 177

Applications governed by this Article are applications made *in the course of the suit* If the plaintiff died after having obtained (under S 88 T P Act) a decree for sale on a mortgage and his sons applied more than six months after their father's death to be brought on the record in the place of the deceased and to have an order absolute for sale made in their favour held that as the suit was at an end when the conditional decree for sale was passed the application was not one made in the course of the suit this Article therefore did not apply and the application was not barred—*Mehar Bibi v Yakub* 11 C W N 156 (157 158)

The words 'plaintiff or appellant' show that this Article applies to applications made in the course of a suit or an appeal and not to applications made during execution proceedings Thus it does not govern an application made by the representative of a deceased decree holder claiming admission to continue the execution proceeding commenced by the deceased The execution proceeding does not abate on the decree holder's death, consequently his representative may come in at any time—*Gulab Das v Lakshman* 3 Bom 221, *Dulari v Mohan Singh* 3 All 750 See also *Jagatram v Rakhai* 10 C L J 398 3 Ind Cas 324 But he must of course apply within the period of limitation prescribed by Article 18 — *Dulari v Mohan Singh* (supra)

So also this Article does not govern an application made by the representatives of a plaintiff coming in to appeal where the plaintiff has

died after decree The representative has the same period to make his appeal as the plaintiff himself would have had—*Ramanada v Minatchi*, 3 Mad 236

177.—Under the same	Ninety	The date of the death
Code to have the legal	days	of the deceased defend-
representative of a		dant or respondent
deceased defendant		
or of a deceased res-		
pondent made a party.		

This Article corresponds to Article 175C of the Act of 1877

685. Change.—The period of limitation has been reduced from six months to ninety days by section 2 of the Limitation and C. P. Code Amendment Act (XXVI of 1920)

Section 2 of the Act XXVI of 1920 ran as follows :—

"In the Third Division of the First Schedule to the Indian Limitation Act 1908, in Articles 176, 178 and 179, for the word "Ditto" in the second column, the words "Ninety days" "Six months" and "Ninety days" respectively shall be substituted "

It should be noted however that though this section made no mention of Article 177, its effect was to alter the period of six months provided by this Article into ninety days; for by retaining the 'Ditto' in Article 177 and changing the 'Ditto' in Article 176 to 'Ninety days,' it practically prescribed 90 days for Article 177

But as no mention was made of Article 177 in the above section, the Lahore High Court (as well as other High Courts) held that the Amendment Act XXVI of 1920 did not reduce the period of limitation of Article 177, as no mention of that Article was made in the body of the Amendment Act, though there might be mention of it in the Statement of Objects and Reasons—*Govind Das v Rup Kishore*, 4 Lah 367, *Rup Kishore v Bhagat Govind Das*, A. I. R. 1922 Lah 211, 69 Ind Cas 748; *Arjun Das v Nanish Chand*, 78 Ind Cas 771, *Skinner v. Maharram Ali*, 92 Ind Cas 330, A. I. R. 1925 All. 77; *Subramania v Shanmugam*, 49 M. L. J. 363 The same argument was advanced by the Counsel in the Calcutta High Court case of *Seodoyal v Joharmull*, 50 Cal 549, 75 Ind. Cas 81

In view of this interpretation, this Article has been expressly amended by the Amending and Repealing Act 1923 (XI of 1923) as follows :—

"2 In the Third Division of the First Schedule to the Indian Limitation Act, 1908, in Articles 176, 177, and 179, for each of the entries in the second column, the entry "ninety days" shall be substituted .." See *Gazette of India* 1923, Part IV, p. 54.

The reasons have been thus stated: "This amendment is designed to correct a drafting error which had the effect of leaving the period o

limitation in Article 177 as six months though the intention was to reduce it to ninety days. In a recent case before the High Court of Judicature at Lahore a doubt arose as to the effect of amendments made by Act XXVI of 1920 in the period of limitation prescribed in items 176, 177 and 179 of the Schedule. The object of the present amendment is to substitute for the *Dittos* the actual periods prescribed.—*Ga. etc. of India* 1933 Part V pp. 93-94.

Moreover to prevent further misconceptions in the future the Amending and Repealing Act of 1923 has omitted all *Dittos* from the 2nd columns of all the Articles of the Limitation Act and substituted the actual periods of limitation.

686 Scope.—This Article refers to applications under C. P. Code O 22 rules 4 and 11 (secs. 368 and 382 of the Code of 1908). But it does not refer to an application under O 2 rule 2 (see 36 of the old Code). Thus where one of several respondents dies and the right of appeal survives against the surviving respondents alone an application for a declaration (under O 22 rule 2) that the surviving respondents are the legal representatives of the deceased and that the appeal shall proceed against them does not fall under this Article. It would be governed by the general Article 181.—*Shamanund v. Rajnarain* 11 C. W. N. 186 (188).

This Article applies to applications made in the course of a suit or an appeal and does not apply to an application for substitution made in execution proceedings. Such an application may be made beyond six months and the execution proceedings will not abate.—*Amolak Ram v. Shamu Ram* 174 P. L. R. 1911 30 Ind. Cas. 405. So where after attachment of the judgment-debtor's property in execution of a decree the judgment-debtor dies the decree holder is not bound to bring upon the record the legal representative of the judgment-debtor. He can execute the decree against the legal representative of the deceased so long as execution is not barred by limitation.—*Bhagwan Das v. Jugal Kishore* 47 All. 370 (1913).

This Article does not apply where the defendant dies *after the decree* in a suit but before any final order has been passed and his legal representatives apply to be brought on the record in the further proceedings taken in pursuance of the decree. To such a case Art. 181 applies and as it is an application in a pending suit within the meaning of section 37 C. P. Code (for as there has not been any final order the suit must be treated as pending) the right to apply under Article 181 accrues from day to day and the application is not barred even though made more than three years after the defendant's death.—*Surendra Keshab v. Ahetter Krishito* 30 Cal. 609 (following *Hedar Nath v. Harra Chand* 8 Cal. 40). The *ratio decidendi* of the judgment is not very clear. It is difficult to understand why section 372 C. P. Code was applied instead of sec. 368 which is in fact more appropriate here for that section refers to devolution of

interest by *death*, whereas sec. 372 refers to *other cases* of devolution of interest

In another Calcutta case it was held that if during the pendency of a suit to recover land a sole defendant died, the plaintiff's application to bring in the legal representatives of the deceased fell under section 372 C. P. Code (now O 22, rule 10) and not under section 368 (now O 22, rule 4) and that the applicant had three years to make the application under Article 178 (now 181) of the Limitation Act—*Benode Mohun v Sarat*, 8 Cal 837. The learned Judge in this case gave a very pedantic interpretation to the expression "right to sue" occurring in section 368, and held that that expression was used in the Code in the sense in which the term "cause of action" had an accepted meaning in the English Judicature Act, i.e., it was used with reference to personal actions for damages, for breach of contract or for tort, and did not apply to suits for recovery of land; and that if a devolution of interest took place by death in a suit relating to possession of land, the case would come not under section 368 but under the general provisions of section 372 which relate to 'creation, assignment or devolution of interest' This case has been dissented from by the other High Courts in *Ojagar v Niamal*, 1890 A W N 21, *Jamnadas v Sorabji*, 16 Bom 27, and *Jafar v Jawaya*, 76 P R 1884. The Punjab Chief Court points out that the expression 'cause of action' or "right to sue" means any cause of action whether the suit be for damages for personal property or for immovable property or for some peculiar relief—*Jafar v. Jawaya* (supra). Further, since the expression used in the Judicature Act is "cause of action" whereas the C P Code uses the simpler expression 'right to sue,' this latter expression should be taken in its ordinary acceptation and not in the highly technical sense in which the former expression is used in the English Act. Moreover, as pointed out in the Bombay case, section 368 specifically provides for a case where a defendant or sole defendant *dies*, whereas sec. 372 refers to *other cases* of creation, assignment or devolution of interest —*Jamnadas v Sorabji*, 16 Bom 27 (28).

This Article equally applies to an application for substitution made in the course of a *second appeal* as well as in the course of a first appeal, and is not restricted to applications made during first appeals only. Thus, where the respondent in a second appeal died during the pendency of the appeal an application by the appellants to substitute his heirs on the record is governed by the six months' rule under Art. 177, and not by the three years' rule of Art. 181—*Upendra v Sham Lal* 34 Cal 1020 (1023), *Madhuban v Narain Das* 29 All 535 (536) *Sheikh Adam v Balaji*, 10 Bom L R 509. The Madras High Court, however, held that the period of limitation for bringing the legal representative of a deceased respondent in second appeal was three years and not six months—*Susya Pillai v Aiyakannu* 29 Mad 529 F B (overruling *Vakkalagadda Narasimham v*

limitation in Article 177 as six months though the intention was to reduce it to ninety days" "In a recent case before the High Court of Judicature at Lahore a doubt arose as to the effect of amendments made by Act XXVI of 1920 in the period of limitation prescribed in items 176, 177 and 179 of the Schedule. The object of the present amendment is to substitute for the 'Dittos' the actual periods prescribed"—*Gazette of India*, 1923, Part V, pp 93, 94

Moreover, to prevent further misconceptions in the future, the Amending and Repealing Act of 1923 has omitted all 'Dittos' from the 2nd columns of all the Articles of the Limitation Act, and substituted the actual periods of limitation

686 Scope —This Article refers to applications under C P Code, O 22 rules 4 and 11 (secs 368 and 382 of the Code of 1908) But it does not refer to an application under O 22, rule 2 (sec 362 of the old Code) Thus where one of several respondents dies and the right of appeal survives against the surviving respondents alone, an application for a declaration (under O 22 rule 2) that the surviving respondents are the legal representatives of the deceased and that the appeal shall proceed against them does not fall under this Article It would be governed by the general Article 181—*Shamanund v Rajnarain*, 11 C W N 186 (188)

This Article applies to applications made in the course of a suit or an appeal, and does not apply to an application for substitution made in execution proceedings Such an application may be made beyond six months, and the execution proceedings will not abate—*Amolak Ram v Shamu Ram*, 174 P L R 1911, 10 Ind Cas 405 So, where after attachment of the judgment-debtor's property in execution of a decree, the judgment-debtor dies, the decree holder is not bound to bring upon the record the legal representative of the judgment-debtor He can execute the decree against the legal representative of the deceased, so long as execution is not barred by limitation—*Bhagwan Das v Jugal Kishore*, 42 All 570 (573)

This Article does not apply where the defendant dies after the decree in a suit but before any final order has been passed, and his legal representatives apply to be brought on the record in the further proceedings taken in pursuance of the decree To such a case Art 181 applies, and as it is an application in a 'pending suit' within the meaning of section 372 C P Code (for as there has not been any final order, the suit must be treated as pending) the right to apply under Article 181 accrues from day to day and the application is not barred, even though made more than three years after the defendant's death—*Surendra Keshab v Khettler Krishlo*, 30 Cal. 609 (following *Kedar Nath v. Harra Chand*, 8 Cal 420) The ratio decidendi of the judgment is not very clear It is difficult to understand why section 372 C P Code was applied instead of sec 369, which is in fact more appropriate here, for that section refers to devolution of

enlarge the time for sufficient cause. But after abatement it is open to the plaintiff or appellant to make an application under O 27 r 9 to set aside the order of abatement (within the period of two months prescribed by Article 171) on the ground that he was prevented by sufficient cause from making the application for substitution within time. See *Secretary of State v Jawahir* 36 All 335 (37) *Lachmi Narain v Md Yusuf* 42 All 540 (541) *Daya Singh v Buta Singh* 118 P R 1916

178—Under the same Six The date of the award
Code for the filing in months
Court of an award in a
suit made in any
matter referred to
arbitration by order of
the Court, or of an
award made in any
matter referred to
arbitration without the
intervention of a
Court

This Article corresponds to Art 170 of Act XX of 1877

687 Scope of Article.—This Article applies only when an application is made by the parties for filing an award. The arbitrators themselves may file an award more than six months after it is made because the act of the arbitrators in handing over the award to the proper officers of Court for the purpose of filing it is not an application for filing an award. This Article has therefore no application to the case—*Robertis v Harrison* 7 Cal 333 (336). In fact no application is necessary for the arbitrators to file an award. They can simply make over the award to the Court to be filed—*Ibid* (at p 337)

This Article may apply to an application by a party to compel an arbitrator to file his award—*Ibid* (at p 337)

The date of the award is the date on which it is delivered to the parties so that they may have notice of its contents and may give effect to it and not the date on which it is actually written and signed—*Sreenath Chatterjee v Koylash Chunder* 21 W R 248. When the award is not delivered to the parties till some time after it is made limitation runs from the date of the delivery. It is clearly the intention of the Legislature that a party to an arbitration should have six months to enforce the award from the time when he is in a position to enforce it—*Dutto Singh v Dosad Bahadur* 9 Cal 575 (578). The date on which a draft award was made is not the date of the award. The draft award is not an award at all and its publication is

Vakizulla, 28 Mad 498) This conflict of opinion was due to the defective language of Article 175C of the Act of 1877, the first column of which ran thus: "Under sec 368 of the Code of Civil Procedure, to have the legal representative of a deceased defendant made a defendant, or under that section and section 582 of the same Code, to have the legal representative of a deceased plaintiff respondent or defendant respondent made a plaintiff-respondent or defendant respondent." Thus, the words 'plaintiff respondent' and 'defendant respondent' led the Madras Court to hold that this Article was restricted to first appeals only. The language of the present Article is quite general and the word 'respondent' undoubtedly includes a respondent in second appeal.

An application made after the passing of the Act of 1908 to bring the legal representative of the deceased respondent who had died during second appeal while the Act of 1877 was in force, will be governed by the six (now three) months' rule under the present Article, and not by the three years' rule (which was the opinion of the Madras High Court, see 29 Mad 521 *supra*) of the Act of 1877. This cannot cause any hardship to the applicant, for though the new Limitation Act had been passed on the 7th August 1908, the period of its coming into operation was postponed till the 1st January 1909, and the applicant could have made his application during this intervening period. If he has not done so, his application must be dismissed as barred. Even the benefit of section 30 will not avail to the applicant as that section refers to suits and not to applications—*Prayll v Sankaran*, 34 Mad 292 (293-294) 20 M L J 347, 5 Ind Cas 420.

Extension of time for sufficient cause—Under section 372A of the C P Code, 1882 (O 22, r 9 of the Code of 1908), sec 5 of the Limitation Act was made applicable to applications under sec 368A of the Code (O 22, r 4 of the present Code), so that an application for substitution could have been made beyond the period of six months prescribed by Article 175C if there was sufficient cause for delay, as section 368 of the C P Code in express terms gave power to the Court to enlarge the period of six months for sufficient cause shown. See *Madhuban v Narain* 23 All 535 (537), *Chajmal v Jagdamba* 11 All 408. Thus, the appellant's ignorance of the fact of the respondent's death was a sufficient cause for not making the application within the time limited—*Gaman v Baksha* 42 P R 1887, *Dadu v Hadu*, 113 P R 1907. So also, where the plaintiff acting *bona fide* brought in a wrong person as the legal representative of a deceased defendant within time, but came to know of the error more than six months after the death of the defendant, and then applied to have the right person brought on the record, his latter application would not be barred—*Syed Hossein v Abdur Rahim* 7 C W N 529. But under the Civil Procedure Code of 1908, the law has been changed, for under O 22, rule 4, if no application for substitution is made within the time limited (now three months), the suit or appeal shall abate, and that rule gives the Court no power to

the application under O 21 r 90 cannot be deducted—*Sornam v Thiruvaihiperumal* 51 M L J 16 96 Ind Cas 657 A I R 1926 Mad 857

181—Applications for Three When the right to apply which no period of years accrues limitation is provided elsewhere in this schedule or by section 48 of the Code of Civil Procedure, 1908

This Article corresponds to Art 178 of Act XV of 1877

691 Scope of the Article —The operation of this Article is limited to applications made under the *Civil Procedure Code*. Since all the other applications in this division are applications under the Code it is natural to conclude that the applications referred to in this Article are applications *ejusdem generis* i.e. applications under the C P Code—*Bai Manekbai v Manekji* 7 Bom 213 (214) *Wadia v Purshoram* 32 Bom 1 *Madhab Mani v Lambert* 37 Cal 796, *Empress v Afudhia Singh* 10 All 350 *Gnanamuthu v Vana* 17 Mad 379 (381) *Ranjit v Draggal* 16 All 231 *Tiluck Singh v Parsolam* 22 Cal 924 *Rahmat Karim v Abdul* 34 Cal 672 (674) *In re Ishan Chunder* 6 Cal 707 (708) *Jagdish v Holloway* 2 P L J 206 (208)

Therefore this Article does not apply to applications for probate letters of administration or succession certificate (though of course long and unexplained delay may throw doubt on the genuineness of the will)—*In re Ishan Chandra* 6 Cal 707 (709) *Gnanamuthu v Vana Kailpillas* 17 Mad 379 (381) *Bai Manekbai v Manekji* 7 Bom 213 (214) *Kashi v Gopi* 19 Cal 48 *Janaki v Keshavalu* 8 Mad 207 or to an application under the Religious Endowment Act—*Janaki v Kesavalu* 8 Mad 207 It has no application to proceedings taken under the *Bhagdari Act* (Bombay Act V of 1862)—*Collector v Desai* 7 Bom 546 (551) It does not apply to an application made under sec 214 of the *Indian Companies Act* 1882—*Connel v Himalayan Bank* 18 All 12 (15) It does not apply to applications for enforcement of costs by a solicitor against his client by the summary method provided by the Rules of the High Court—*Wadia v Purshoram* 32 Bom 1 *Naradara Lal v Tambala* 25 C W N 800 *Lakshmoni v Dwijendra* 46 Cal 249 (253) 23 C W N 473 It cannot apply to proceedings to set aside a fraudulent transfer under sec 36 *Provincial Insolvency Act*—*Daryal v Kunj Lal* A I R 1926 Lah 553, or to an application made by a Receiver under sec 36 of the *Provincial Insolvency Act* 1907—*Duraiya v Venkatarama* 12 L W 535 60 Ind Cas 123 (But see *Mir Asfal v Mir Aman* 107 P L R 1914 23 Ind Cas 397 and *Nikka*

1911 He made an application in 1913 which resulted in an order Deliver passed on 7 7 13 but on 30 7 13 the Court ordered on the same petition No one to take delivery petition dismissed In 1915 the purchaser again applied for delivery of possession It was held by *Abdur Rahim J* (Oldfield J *contra*) that the order of dismissal on 30 7 13 not having been made after hearing the purchaser it must be deemed to be a dismissal only for statistical purposes and that the application of 1915 might be treated as one for the execution of the general order for delivery made in 1913 and being in that view a continuation of the prior proceeding was not barred by Article 180 *Oldfield J* however held that the prior application having been dismissed on account of the purchaser's default the prior proceedings could not be held to have continued thereafter and that the application of 1915 could not therefore be regarded as a continuation of the previous application or as an application for further execution of the general order for delivery passed in the prior execution proceeding—*Yandir Subbaya v Rajah Venkatramayyah* 1918 M W N 214 43 Ind Cas 155 7 I W 16

The period of limitation runs from the date on which the sale becomes absolute A sale does not necessarily become absolute as soon as it is confirmed Thus where a sale is confirmed without opposition but afterwards a petition is made under O 21 r 90 to set aside the sale the period of limitation for an application under this Article begins to run from the date of the order disallowing the petition to set aside the sale and not from the date of the first confirmation because the sale does not become

4 Mad 172 it does not apply to an application made in a *pending case*, e.g. an application to revive a suit in which no final order has been made—*Ram Nath v Umackaran*, 3 C W N 750, *Surendra v Kheller*, 30 Cal. 609, *Kedarnath v Hara Chand*, 8 Cal 420, *Madhab Moni v Lambert*, 37 Cal 796 (806), or to an application to revive a suit and restore it to the board, or to transfer a case from one board to another or to transfer a case to the bottom to the board and so forth—*Gorind Chunder v Rungunmony*, 6 Cal 60 (64). This Article does not apply to an application asking the Court to pass judgment on an award filed in Court, because it is an act which the Court is bound to do—*Iswardas v Dosibai*, 7 Bom 316 (322); or to an application to bring the attached property to sale—*Phiraja v. Adu Ram*, 179 P. R. 1882.

692. Applications in mortgage suits:—*Application for final foreclosure-decree*—An application for a final decree in a foreclosure suit under sec 87 of the Transfer of Property Act (O 34, rule 3 of the C P Code of 1908) is governed by this Article, and time runs from the date fixed in the preliminary decree under section 86 for the payment of the mortgage money. Article 182 cannot apply, because the various clauses in the 3rd column of that Article are inapplicable to the present application. The only clause which can apply, if at all, is clause 1, but the decree or order referred to in that clause is a decree executable on the date it is passed, whereas the preliminary decree in a foreclosure-suit is not executable on the date on which it is passed but only on the expiry of the date fixed therein for the payment of the mortgage-money. Consequently Article 182 is inapplicable—*Ali Ahmed v. Naziran*, 24 All 512 (545, 546); *Balaram v Kanhai*, 1 P L. J. 364 (366); *Rajkumar v. Kedar Nath*, 1 Pat 435. But in *Parmeshri v Mohan Lal*, 20 All 357 such an application was held to be an application for execution of the preliminary decree for foreclosure and therefore governed by Article 182. In *Sham Sundar v. Md Ihtisham*, 27 All 501 (505), it was not decided whether Article 181 or 182 was applicable, but Stanley C. J. expressed the opinion that an application for a final decree for foreclosure was an application for *execution of the decree nisi*.

The Calcutta High Court is of opinion that an application for a final decree for foreclosure is not governed by this Article (nor by any other Article), because it is an application made in a *pending suit* i.e. it is an application to terminate a pending proceeding, and is in effect an application to the Court to do an act which the Court is bound to do. Consequently no question of limitation arises—*Madhabmoni v. Lambert*, 37 Cal 796 (806, 807). Even if this Article applies, the right to apply may be deemed to accrue from day to day (as it is made in a *pending suit*)—*Ibid* (following 30 Cal. 609 and 8 Cal. 420).

Where the High Court on appeal modifying the decree of the lower Court for sale passed a preliminary decree for foreclosure, the period of limitation for a final decree for foreclosure ran from the date of the appellate decree

Mal v. Marwar Bank 131 P R 1919 5 Ind Cas 188) According to the Lahore High Court this Article is not restricted to applications under the C P Code but refers to all applications for the making of which the Civil Procedure Code gives authority. Thus an application to set aside an *ex parte* order passed under sec 150 of the Indian Companies Act (1882), is an application under O r 13 of the C P Code (read with sec 141 of that Code) and is therefore an application governed by Article 181 of the Limitation Act—*Hindustan Bank v Mehraj*, 1 Lah 187 (191) 55 Ind Cas 820. In a Calcutta case, Article 181 has been applied to an application to set aside a sale under sec 173 of the Bengal Tenancy Act on the ground that the application is cognisable under sec 47 C P Code—*Chand Moner v Santo Moner* 24 Cal 707 (709 710).

This Article is restricted to applications made to a Court asking it to exercise powers which unless moved by such applications it is not bound to exercise *suo motu*. It does not apply where a Court is asked to do an act which it is bound to do and has no discretion to refuse to do. Thus, a Court is bound of its own motion to bring a decree into conformity with its judgment, under sec 206 of the C P Code (1882); no application is necessary for that purpose, even if an application is made, it is not subject to the rule of limitation under this Article—*Darbo v Keshto* 9 All 354 355 (dissenting from *Gaya Prasad v Sisir Prasad*, 4 All 23), *Kalu vs Jalu* 23 Cal 259, *Shivappa v Supanch* 11 Bom 284. *Dhan Singh v Basant* 8 All 519. So also, where an order for partition has been made in a suit it is the duty of the Court to effect the partition and no application need be made by the plaintiff for the purpose of effecting a partition. Even if an application is made, Article 181 does not apply to it and such application is not barred by reason of the fact that it is made more than three years after a previous application. Article 182 also cannot apply as it is a proceeding in the suit itself and not a proceeding in execution no final decree having been made in the suit—*Dwarkanath v Barindra* 22 Cal 425 (431). An application by the mortgagor for payment of money under O 34 r 8 is not governed by this Article because no application is at all necessary for the purpose—*Bhawani Prasad v Ravi Kanta* 28 O C 261. A I R 1925 Oudh 619. The appointment of a Commissioner is a matter which it is competent for a Court to make without being put in motion by any party to the litigation, and therefore an application by a party with reference to such matter is not governed by this Article—*Latchmanan v Ramanathan* 28 Mad 127 (129). So also, it does not apply to an application to the Court to perform the functions of a ministerial character *e g* an application by an auction purchaser for a certificate of sale—*Vithal Janardan v Vithojirao* 6 Bom 586 587 (dissenting from *Ra Kkaja Pathany*, 5 Bom 202). *Desidas v Pirajada* 8 Bom 377 (dissenting from 5 Bom 202 and *Tukaram v Salvaji* 5 Bom 206). *Kylasa v Ramasami*,

4 Mad 172 it does not apply to an application made in a *pending case*, e g an application to revive a suit in which no final order has been made—*Ram Nath v Umacharan* 3 C W N 750 *Surendra v Kheller*, 30 Cal. 609, *Kedarnath v Hara Chand*, 8 Cal 420, *Madhab Moni v Lambert*, 37 Cal 796 (806), or to an application to revive a suit and restore it to the board or to transfer a case from one board to another or to transfer a case to the bottom to the board and so forth—*Gowind Chunder v Rungunmony*, 6 Cal 60 (64) This Article does not apply to an application asking the Court to pass judgment on an award filed in Court, because it is an act which the Court is bound to do—*Isardas v Dosibai*, 7 Bom 316 (322); or to an application to bring the attached property to sale—*Phiraja v. Adu Ram*, 179 P. R 1882

692 Applications in mortgage suits.—*Application for final foreclosure-decree*—An application for a final decree in a foreclosure suit under sec 87 of the Transfer of Property Act (O 34, rule 3 of the C P Code of 1908) is governed by this Article, and time runs from the date fixed in the preliminary decree under section 86 for the payment of the mortgage money Article 182 cannot apply, because the various clauses in the 3rd column of that Article are inapplicable to the present application The only clause which can apply, if at all, is clause 1, but the decree or order referred to in that clause is a decree executable on the date it is passed, whereas the preliminary decree in a foreclosure suit is not executable on the date on which it is passed but only on the expiry of the date fixed therein for the payment of the mortgage money Consequently Article 182 is inapplicable—*Ali Ahmed v Nasiran*, 24 All 542 (545, 546); *Balaram v Kanhai*, 1 P. I J 364 (366), *Rajkumar v Kedar Nath*, 1 Pat 435 But in *Parmeshri v Mohan Lal*, 20 All 357 such an application was held to be an application for execution of the preliminary decree for foreclosure and therefore governed by Article 182 In *Sham Sundar v Md Jhisham*, 27 All 501 (505), it was not decided whether Article 181 or 182 was applicable, but Stanley C J expressed the opinion that an application for a final decree for foreclosure was an application for *execution of the decree nisi*

The Calcutta High Court is of opinion that an application for a final decree for foreclosure is not governed by this Article (nor by any other Article), because it is an application made in a *pending suit* & it is an application to terminate a pending proceeding, and is in effect an application to the Court to do an act which the Court is bound to do Consequently no question of limitation arises—*Madhabmoni v Lambert*, 37 Cal 796 (806, 807) Even if this Article applies, the right to apply may be deemed to accrue from day to day (as it is made in a *pending suit*)—*Ibid* (following 30 Cal 609 and 8 Cal 420)

Where the High Court on appeal modifying the decree of the lower Court for sale passed a preliminary decree for foreclosure, the period of limitation for a final decree for foreclosure ran from the date of the appellate decree

of the High Court (or rather the date fixed in that decree for payment of the mortgage money) if the other party preferred an appeal to the Privy Council and that appeal was dismissed for default of prosecution the decree-holder would not be entitled to compute the period of limitation from the date of the order of the Privy Council dismissing the appeal for default—*Rajkumar v Kedar Nath* 1 Pat 435 (441) 3 P L T 565 66 Ind Cas 97. The plaintiff sued for foreclosure of a mortgage which purported to comprise five villages but he obtained a preliminary decree in 1899 in respect of three villages only. He appealed against the dismissal of his suit as regards the other two villages and this appeal was dismissed by the High Court in 1902. In 1903 he applied for a final decree for foreclosure. Held that this application was not barred by limitation because time ran not from the date fixed in the preliminary decree for payment of the mortgage money but from the date of the decree of the High Court, because it was not until that date that there was any final decision as to the property to be foreclosed—*Siam Sundar v Md Ishkam* 27 All 501 (509). Where after the plaintiff applied for a final foreclosure decree, the day fixed in the preliminary decree for payment of the mortgage money was postponed at the defendant's request the postponement did not amount to a dismissal of the application of the plaintiff to have a final decree passed. The application must be deemed to have remained pending for final orders and the Court must be deemed to have postponed the passing of the final orders. No further application for a final decree is necessary, and any subsequent application if made in that behalf is only for the continuation of the proceeding on the original application which has been suspended. Such an application being an application made in a pending case is not governed by Article 181 or by any rule of limitation—*Chinnaji v Sonaji* 21 N L R 47 88 Ind Cas 901 A I R 1925 Nag 291.

Application for final decree for sale—Before secs 83-90 of the Transfer of Property Act were incorporated into the C P Code of 1908 there was a conflict of opinion as to whether Article 181 or 182 applied to an application under sec 89 of the T P Act for an order absolute for sale of the mortgaged property. In the following cases it was held that such an application being an application for execution of the decree passed under sec 88 of the Transfer of Property Act was governed by the rule of limitation prescribed for an application for execution i.e. Art 179 of the Act of 1877 and not by Article 178 which is limited to applications under the Civil P Code—*Mallikarjunudu v Lingamurti* 25 Mad 244 (F B), *Mammali v Kutli Amma* 39 Mad 544, *Bhagawan v Ganu* 23 Bom 644, *Chunni Lal v Harnam* 20 All 302 F B, *Ranbir v Drighal*, 16 All 23, *Badri Narayan v Kunj Behari*, 35 All 178, *Oudh Behari v Nageshwar*, 13 All 278 (F B), *Kisla v Banamoyi* 19 C W N 640. And this was the view of the Privy Council in *Abdul Majid v Jawahir* 36 All 350 (P C), *Bahad Nath v Munni Des* 36 All 284 (P C).

In *Pamayyan v Kadir Backa* 31 Mad 68 (60) and *Baldeo v Ibn Haider* 27 All 65 (627 68) such applications were held to be governed by either of the Articles 181 182 whereas in *Taluk v Parshoram* 22 Cal 924 *Pramatha v Khetra Mohan* 20 Cal 651 and *Adjudhia Pershad v Baldeo* 11 Cal 818 it was held that the proceedings under sec 89 of the T P Act were merely in continuation of the original suit that therefore the application under sec. 89 was not subject to any limitation that Art 181 did not apply because that Article was limited to applications under the C P Code and that Article 182 also did not apply because the proceeding under sec. 89 of the T P Act was not one in execution of a decree In *Rungiah v Nanjappa* 26 Mad 780 (789) the application was held to be governed by Article 181 and not by Article 182

After sections 85-90 have been incorporated into the C P Code it has been held that an application for a final decree for sale in a mortgage (O 34 r 5) being an application under the C P Code falls under this Article and Article 182 cannot apply because the application is not strictly speaking one for execution of the preliminary decree (but is an application to obtain a further decree)—*Ahmad Khan v Gaura* 40 All 235 *Nizamuddin v Bokra Bhim Sen* 40 All 203 (205) *Beni Singh v Berhamdeo Singh* 19 C W N 473 *Bala Ram v Kanhai* 1 P L J 364 (366) *Madha Ram v Nihal Singh* 38 All 21 *Datto Almarum v Sanhar* 38 Bom 32 *Venkayya v Sathiraju* 44 Mad 714 (715) *Kuppai Chetty v Krishnamoai* 14 M L T 191 *Ramji v Karan* 39 All 532 *Gajadhar v Kishan* 39 All 641 *Harjivan v Gojagan* 25 Bom L R 459 Time begins to run after the expiry of the period fixed by the preliminary decree for payment of money (if there is no appeal from the preliminary decree)—*Ahmed v Gaura* 40 All 235 (237) *Raj Behari v Juman* 4 P L J 523 (524) *Nanhelal v Gulshan* 18 N L R 58 If there is an appeal against the preliminary decree time runs from the date of the appellate decree or of the decree in second appeal as the case may be but not from the date fixed in the preliminary decree of the Court of first instance—*Sayid Jawad Hossain v Genda Singh* 7 P L T 575 (P C) 44 C L J 63 A I R 1926 P C 93 (overruling 38 All 21 on this point) *Nimmala v Seetharamiah* 32 M L J 455 41 Ind Cas 268 *Mahabir v Kanhaiya Lal* 21 A L J 526 *Gajadhar Singh v Kishan Jivan Lal* 39 All 641 (F B) *Nizamuddin v Bokra Bhim Sen* 40 All 203 *Uma Charan v Nibaran* 37 C L J 452 *Sayid Jawad Hussain v Genda Singh* 1 Pat 444 *Venkayya v Sathiraju* 44 Mad 714 (717) *First Holmes v Bank of Upper India* 5 Lah 257 (259) *Lallu v Jot* 21 O C 176 *Subbarajulu v Sundararajulu* 35 M L J 507 48 Ind Cas 185 but not from the date of the order of the Privy Council dismissing the Privy Council appeal for default of prosecution—*Abdul Majid v Jawahir* 36 All 350 (P C) *Sackindra v Maharaj Bahadur* 49 Cal 203 (P C)

The fact that there was a clerical error in the decree in the statement

In *Rahmat Karim v. Abdul Karim*, 34 Cal 672 (674), Article 181 was held inapplicable to an application under sec 90 T P Act because that Article is limited to applications under the C P Code and does not apply to applications under the T P Act. But now that sec 90 of the T P Act has been incorporated into the C P Code, the ruling in 34 Cal 672 would no longer be good law. In *Biswakambhar v. Ramsundar*, 42 Cal 291 (299) Article 181 was held to be inapplicable even in an application under O 34, r 6 of the C P Code. In a recent Full Bench case (overruling the above two cases) the Calcutta High Court has laid down that an application under O 34, r. 6 is governed by Article 181—*Pell v. Gregory*, 52 Cal 828 (F. B.), 29 C. W. N. 678, A. I. R. 1925 Cal 834.

As regards the time when the right to make such application accrues, the High Courts are not unanimous. In some cases it has been held that the right to apply accrues after the sale, when it is found that the sale proceeds are insufficient to satisfy the debt—*Gajadhar v. Alliance Bank*, 28 All 660 (664); *Id. Itisat v. Alimunnissa*, 40 All 551 (552), *Raj Narain v. Santi Lal*, 21 A. L. J. 37, A. I. R. 1923 All 203, *Venkatasubba v. Shanmugam*, 1913 M. W. N. 867. In several other cases, however, it has been held that it is not necessary that the applicant should make his application within 3 years of the date of the confirmation of the mortgage sale. It is the date of the suit and not the date of the application which must be looked to; if he had his personal remedy at the date of the institution of the suit on the mortgage i. e. if the suit on the mortgage had been brought within 6 years from the due date of the mortgage (Art. 116), the application for personal decree is not barred, though made more than 3 years after the date of sale. When an application is made under sec 90 of the I. P. Act, the Court has to consider, if any question of limitation arises, whether the personal remedy was barred at the date of the institution of the suit, and not whether it would be barred at the date of the application under sec 90—*Rahmat Karim v. Abdul Karim*, 34 Cal 672 (675), following *Purna Chandra v. Radha Nath*, 33 Cal 867 (873); *Hamid ud din v. Kedar Nath*, 20 All 386; *Chattar Mal v. Thakuri*, 20 All 512; *Jangi Singh v. Chander Mal*, 30 All 388; *Gulam Hussein v. Mahamadali*, 34 Bom 540 (545); *Peria Tiruwoods v. Muhammed*, 2 L. W. 66, 27 Ind Cas 770 (771); see also *Biswakambhar v. Ram Sundar*, 42 Cal 291 (297).

693. Application for execution:—Applications for execution are generally governed by Article 182, and the period of limitation runs from the various points of time enumerated in the several clauses of the 3rd column of that Article. But sometimes it may happen that the various points of time enumerated therein will not apply to a particular application; in such a case, the application will fall under Article 181. Article 182 is not exhaustive of applications for execution of decrees, and Article 181 may sometimes be applied to such an application. The law has been thus stated: "The true criterion in determining whether Article 181 or 182

of the amount due would not entitle the decree-holder to count limitation from the date on which the error was corrected as the correction of the error did not make any alteration in the decree and the decree could not be said to be a new decree—*Ram Chandra v Jai Mal* 20 A L J 640

Where a preliminary mortgage-decree was passed against separate sets of defendants for separate amounts decreed against them and some of them appealed while others did not held that the period of limitation for an application for a final decree for sale against the non appealing defendants began to run from the expiry of the fixed date in the preliminary decree for payment of the amount and not from the date of the decree in appeal because the appeal was not an appeal against the whole decree but was limited to that part of the decree which affected the appealing defendants only—*Gyan Singh v Ata Hussain* 43 All 320 (323 324) Where the preliminary decree for sale was passed against all the members of the family and some of the members only appealed but the appeal was preferred in the interests of and on behalf of the whole family the period of limitation for an application for a final decree for sale would run from the date of the appellate decree—*Tula Ram v Bhup Singh* 23 A L J. 867 A I R 1913 All 691 89 Ind Cas 714

Where the preliminary decree was passed in 1897 and the decreeholder after making several applications in 1898 1901 1904 and 1907 made a final application for a final decree for sale in 1909 when the new C P Code was passed it was held that the right to apply accrued when the new C P Code conferred the right in 1909 and the application was therefore not barred. Prior to the passing of the C P Code of 1908 the application which the mortgagee-decreeholder had to make was an application under sec 89 T P Act viz an application for an order absolute for sale i.e. the right which the decreeholder possessed was a right to enforce his judgment not by means of an application for a decree final but by means of an application for an order absolute and thus application Article 179 was held to apply it was the C P Code of 1908 that for the first time conferred on the mortgage-decreeholder the right to apply for a final decree for sale and hence the right to apply for the final decree accrued on the day on which the new C P Code came into operation viz 1st January 1909—*Narasimrao v Bai du* 42 Bom 309 (319 320)

Application under O 34 rule 6—In application for a supplementary decree under sec 90 of the T P Act (O 34 r 6 of the C P Code of 1908) though an application in an execution proceeding is not applicable and for the execution of a decree or order Article 182 is inapplicable and the application is governed by Article 181—*Mad Illias v Ali* 53 Gajadhar 40 All 551 47 Ind Cas 562 *Ram Saray v Ghurani* 21 All 436 58 Annmugam 1913 M W N 867 21 Ind Cas 530 *Chunni Lal v Tihom* 23 1 N L R 76 39 Ind Cas 854

In *Rahmat Karim v. Abdul Karim*, 34 Cal 672 (674), Article 181 was held inapplicable to an application under sec 90 T P Act because that Article is limited to applications under the C P Code and does not apply to applications under the T. P Act. But now that sec 90 of the T P Act has been incorporated into the C. P. Code, the ruling in 34 Cal 672 would no longer be good law. In *Biswambhar v. Ramsundar*, 42 Cal 294 (299) Article 181 was held to be inapplicable even to an application under O. 34, r. 6 of the C. P. Code. In a recent Full Bench case (overruling the above two cases) the Calcutta High Court has laid down that an application under O. 34, r. 6 is governed by Article 181—*Pell v. Gregory*, 52 Cal 818 (F. B.), 29 C. W. N. 678, A. I. R. 1925 Cal 834.

As regards the time when the right to make such application accrues, the High Courts are not unanimous. In some cases it has been held that the right to apply accrues after the sale, when it is found that the sale proceeds are insufficient to satisfy the debt—*Gajadhar v. Alliance Bank*, 28 All 660 (664); *Mid Ilfat v. Alimunnissa*, 40 All 551 (552); *Raj Narain v. Sant Lal*, 21 A. L. J. 37, A. I. R. 1923 All 203; *Penkatasubba v. Shanmugam*, 1913 M. W. N. 867. In several other cases, however, it has been held that it is not necessary that the applicant should make his application within 3 years of the date of the confirmation of the mortgage sale. It is the date of the suit and not the date of the application which must be looked to; if he had his personal remedy at the date of the institution of the suit on the mortgage i. e. if the suit on the mortgage had been brought within 6 years from the due date of the mortgage (Art. 116), the application for personal decree is not barred, though made more than 3 years after the date of sale. When an application is made under sec 90 of the T. P. Act, the Court has to consider, if any question of limitation arises, whether the personal remedy was barred at the date of the institution of the suit, and not whether it would be barred at the date of the application under sec 90—*Rahmat Karim v. Abdul Karim*, 34 Cal. 672 (675), following *Purna Chandra v. Radha Nath*, 33 Cal 867 (873); *Hamid ud din v. Kedar Nath*, 20 All 386; *Chattar Mal v. Thakuri*, 20 All 512; *Jangi Singh v. Chander Mal*, 30 All 388; *Gulam Hussein v. Mahamadalli*, 34 Bom 540 (545); *Peria Tiruvadi v. Muthammel*, 2 L. W. 66, 27 Ind Cas 770 (771), see also *Biswambhar v. Ram Sundar*, 42 Cal 294 (297).

693. Application for execution:—Applications for execution are generally governed by Article 182, and the period of limitation runs from the various points of time enumerated in the several clauses of the 3rd column of that Article. But sometimes it may happen that the various points of time enumerated therein will not apply to a particular application; in such a case, the application will fall under Article 181. Article 182 is not exhaustive of applications for execution of decrees, and Article 181 may sometimes be applied to such an application. The law has been thus stated: "The true criterion in determining whether Article 181 or "

applies to a particular application is to ascertain whether any one of the several points of time specified in col 3 of Art 182 is applicable to it; and if none of them is applicable, it is only then that Art 181 will apply." In this case the decree (passed under sec 88, Transfer of Property Act) directed the sale of the mortgaged property in default of payment of the mortgage-money on or before a date fixed in the decree. On default of payment the decree holder applied for execution of the decree. It was held that Article 182 could not apply, because none of the points of time enumerated in the various clauses of that Article was applicable to the application: thus, clause 1 did not apply, because the decree was not executable on the date of the decree but only at some future time if default was made, clause 7 also did not apply, because the decree as such did not direct the payment of any money on a particular date, but directed the sale of the property if a particular sum was not paid by a given time. Consequently Article 181 was the proper Article applicable to the case—*Rungiah Goundan v Nanjappa*, 26 Mad 780 (189). See also *Thakur Das v Shadi Lal*, 8 All 56 (57). A decree for possession of a property was passed subject to the condition that if the judgment-debtor paid to the decreeholder year by year so long as he might live an allowance of Rs 200 per year for his maintenance the decree for possession would not be executed, but if the judgment-debtor made default in payment of any year's allowance, the decreeholder would be entitled to delivery of possession of the property in execution of that decree. A default having occurred, the decreeholder applied for possession under the above decree. Held that Article 182 could not apply, for it was quite clear that clause 7 of that Article was inapplicable, since the application was for possession and not to enforce a payment of money, and that the other clauses of Article 182 were inapplicable. Consequently Article 181 governed the application—*Muhammad Islam v Muhammad Akbar*, 16 All 237 (239). In this case it was further held (at p 238) that the decreeholder was not bound to execute his decree upon the occurrence of the first default, but might execute it on occasion of a subsequent default; thus, in this case a default took place in 1878 and then another in October 1889, and the decreeholder applied in March 1892, it was held that the application was not barred by reason of the fact that a default had taken place in 1878, i.e. more than three years before the application.

A decree which was passed in 1894 directed that the plaintiff would be entitled to get possession upon payment of Rs 750 to the defendant in any year in the month of *Jeth*. The money was deposited in 1915 and the application for execution was made in 1916. It was held that the application was governed by Art. 181, and not by Art 182. The latter Article applies to cases in which a decree is capable of execution on the date on which it is passed, except in circumstances mentioned in some of the special clauses to that Article. The decree in this case being indefinite as to the date on which the payment of Rs 750 was to be made was not

capable of execution on the date on which it was passed. Therefore Art 181 applied and not Art 182, and the right to apply for execution accrued when the payment was made in 1915. the application was therefore not barred—*Rukmina v Shro Dat* 17 A L J 841, 51 Ind Cas 576

In a suit against E and J of whom J died *pendente lite* a decree was passed in 1906 which did not provide that E should be personally liable but declared that the decretal amount should be realised by the sale of the property of J in L's possession. E for the first time obtained possession of J's property in 1914 and the decreeholder applied in the same year to execute the decree. Held that the application was not barred by limitation; that Art 182 did not apply, in as much as the decree was not capable of immediate execution in 1906, that the application for execution could not be made till E got possession of J's property, and that the Article applicable was Article 181, and the right to apply accrued in 1914 when E obtained possession of J's property—*Maharaja of Darbhanga v Homeshwar Singh*, 6 P. L. J. 132, 137 (P. C.).

A pre-emption decree is incapable of execution until the decreeholder pays the pre-emption price into Court, and consequently clause 1 of Article 182 is inapplicable; and no other clause in Article 182 being under the circumstances applicable, the general Article 181 would apply, and the time for an application for execution of the pre-emption decree commences to run when the price is paid—*Cahedi v Lahu*, 24 All 300, *Chandika v Kalu*, 22 O C. 82, 52 Ind Cas 156

When a perpetual injunction has been granted, the decree may be enforced on each successive breach of it. An application for execution of the decree falls under this Article and must be made within three years of the date of the particular breach which is the occasion for the application. But the decreeholder is not bound to take action in case of every petty infringement, and the fact that he does not enforce his rights on a petty breach will not deprive him of the fruits of his decree if a serious infringement were afterwards made—*Venkatachellian v Veerappa*, 29 Mad 314 (317) See also *Ram Saran v Ghafar Singh*, 23 All 465 (466) where it is held that Article 182 is inapplicable to an application to enforce an injunction upon its disobedience. It was held in *Sadagopachari v Krishnamachari*, 12 Mad 356 (364), and *Goswami Gordhan v Goswami Mahandan*, 40 All 648 (651) that an application for execution of a decree for injunction was to be brought within 3 years of the date of the breach of the injunction, but no Article was mentioned in the judgments.

Where by mistake of Court, the name of the judgment-debtor has been omitted from the decree, the decree is incapable of execution until it is amended and the name of the judgment debtor brought on the record, the right to apply (under Article 181) for execution accrues from the date of amendment—*Debi Bahsh v. Shambhu Dial*, 48 All 281, 24 A. L. J 266, A I R, 1926 All 384

385 (387) *Ashrafuddin v Bipin Behari*, 30 Cal 407 (411); *Gurudeo v Amrit* 33 Cal 689 *Ruddar v Dhanpal*, 26 All 156 (159); *Laksmi v Ballam* 17 All 425 (427). *Rangiah Goundan v Nanjappa*, 26 Mad 780. Contra—*Rajaratnam v Shivalayammal*, 11 Mad 103 (105). It should be noted that many of these cases were decided under the Act of 1877, in which section 15 applied only to suits and did not apply to an application for execution of a decree. under the present Act all the cases relating to injunction cited here would fall under Article 182, and the time during which the execution was stayed by the injunction or prohibitory order would be excluded from computation under section 15, which now applies to applications for execution of decrees. See 34 All 436, at p 442.

Similarly where the execution of a decree was ordered to be stayed pending an appeal from the decree and the execution proceedings struck off, a subsequent application for execution of the decree after dismissal of the appeal was regarded as one for the revival of such proceedings, and was held to be governed by this Article—*Buli Begam v. Nihal Chand*, 5 All 459 (461). *Raghulani v Sheo Saran*, 5 All 243.

Where an application to execute an *ex parte* decree was struck off the file on the application of the judgment-debtor to set aside the decree, and the decree holder filed another application after the rejection of the judgment-debtor's application for reheating of the suit, it was held that the decree holder's second application for execution was only a continuation of the previous proceedings that had been suspended—*Chandra v Gopi Mohan*, 14 Cal 385 (387).

Where the decree holder is obstructed by violence or fraud, and a litigation is necessary to get rid of such obstruction, the execution is suspended owing to such litigation, and a second application made after the termination of such litigation would be a continuation of the first—*Karluck v Nilmoni*, 20 C W N 686, 32 Ind Cas 931 (932).

Where a property attached in execution is released on the claim of a third party against whom the decreeholder has to institute a regular suit, an application for execution against that property made by the decree holder after succeeding in the suit is to be regarded not as a fresh application but as a revival of the previous proceedings and governed by Article 181, and the period of limitation runs from the date of the decree in the claim-suit and not from the date of the previous application—*Paras Ram v Gardner*, 1 All 355, 357, (F B). *Baboo Pyaroo v. Syad Nasir*, 23 W. R 183. *Rudra Narain v Panchu Maith*, 23 Cal 437 (440). This principle applies equally to the case of an attachment before judgment. Thus, where certain properties of the defendant in a money suit were attached before judgment, and after a decree was obtained in that suit, a claim petition was put by in a third party and allowed, and the decree holder consequently filed a suit to establish his right to sell the properties

in execution and obtained a decree in his favour on application by the decree holder for the sale of the properties attached before judgment was pronounced by Article 181 and not by Article 182 and the period of limitation ran from the date of the decree in the latter suit and not from the date of the decree in the first execution—*Subbaraya v. Venkataratnam* 45 Mad 176 (1900) 45 M L J 622 59 Ind Cas 400.

But where the objector's claim to two thirds of the attached property having been allowed the attachment of two thirds of the property was raised and the decree holder filed a regular suit against the objector but he was unsuccessful in that suit and then he made a second application for execution praying for attachment of the one third share which was not raised in the attachment it was held that as the property sought to be attached and sold in the second application was one which the decree holder might have proceeded against notwithstanding the order in the claim proceedings held that the second application was not a continuation of the previous proceeding for execution—*Aghunandan v. Bhangor* 17 Cal 269 (1871).

Where the decree holder has failed to remove the obstacle (i.e. the claim put in by the third party) to his executing the decree the second application cannot be treated as a revival or legal continuance of the first—*Shree Ram v. Saraitalal* 20 Bom 175 (1878) *Ahaimunissa v. Ghool Shandhar* 3 All 484 *Gargal v. Mehra* 30 P R 1832.

An application for execution by the assignee of a decree was dismissed on the objection of the judgment debtor that the assignment was for the benefit of the judgment debtor and that the assignee was therefore not entitled to execute the decree. The assignee thereupon brought a suit to establish her claim that the assignment was for her own benefit and she obtained a decree declaring that she had obtained a valid assignment and establishing her right to execute the decree. She then applied again to execute the decree. It was held that the second application was one to revive or continue the previous application—*Suppa Reddia v. Avudai Ammal* 28 Mad 30 33 (F R).

In June 1892 an application was made for execution of a decree and was dismissed the applicant being relegated to a suit to establish his rights. He did not sue but in September 1892 he put in a fresh application to execute which was dismissed as he had not chosen to bring the suit as directed. He then sued and in March 1895 a decree was passed in his favour. He now put in a petition in October 1895 praying that his petition of September 1892 be revived or continued. It was held that as the last application of September 1892 had not been merely suspended but finally and properly dismissed, the present petition should be treated as a fresh application (and not as a continuation of the first) and therefore barred—*Suryanarayana v. Gurunada* 21 Mad 237 (1900).

Within 3 years from the time fixed in a preliminary decree for sale on a

applies to a particular application is to ascertain whether any one of the several points of time specified in col 3 of Art. 181 is applicable to it; and if none of them is applicable, it is only then that Art. 181 will apply." In this case the decree (passed under sec 88, Transfer of Property Act) directed the sale of the mortgaged property in default of payment of the mortgage-money on or before a date fixed in the decree. On default of payment the decree holder applied for execution of the decree. It was held that Article 181 could not apply, because none of the points of time enumerated in the various clauses of that Article was applicable to the application: thus, clause 1 did not apply, because the decree was not executable on the date of the decree but only at some future time if default was made; clause 7 also did not apply, because the decree as such did not direct the payment of any money on a particular date, but directed the sale of the property if a particular sum was not paid by a given time. Consequently Article 181 was the proper Article applicable to the case—*Rungiah Goundan v Nanjappa*, 26 Mad 780 (789). See also *Thakur Das v. Shadi Lal*, 8 All 56 (57). A decree for possession of a property was passed subject to the condition that if the judgment-debtor paid to the decreeholder year by year so long as he might live an allowance of Rs 200 per year for his maintenance the decree for possession would not be executed, but if the judgment-debtor made default in payment of any year's allowance, the decreeholder would be entitled to delivery of possession of the property in execution of that decree. A default having occurred, the decreeholder applied for possession under the above decree. Held that Article 182 could not apply; for it was quite clear that clause 7 of that Article was inapplicable, since the application was for possession and not to enforce a payment of money; and that the other clauses of Article 182 were inapplicable. Consequently Article 181 governed the application—*Muhammad Islam v. Muhammad Akbar*, 16 All 237 (239). In this case it was further held (at p. 238) that the decreeholder was not bound to execute his decree upon the occurrence of the first default, but might execute it on occasion of a subsequent default; thus, in this case, a default took place in 1878, and then another in October 1889, and the decreeholder applied in March 1892; it was held that the application was not barred by reason of the fact that a default had taken place in 1878, i.e. more than three years before the application.

A decree which was passed in 1894 directed that the plaintiff would be entitled to get possession upon payment of Rs. 750 to the defendant in any year in the month of *Jeth*. The money was deposited in 1915 and the application for execution was made in 1916. It was held that the application was governed by Art. 181, and not by Art. 182. The latter Article applies to cases in which a decree is capable of execution on the date on which it is passed, except in circumstances mentioned in some of the special clauses to that Article. The decree in this case being indefinite as to the date on which the payment of Rs. 750 was to be made was not

capable of execution on the date on which it was passed. Therefore Art 181 applied and not Art 182, and the right to apply for execution accrued when the payment was made in 1913. The application was therefore not barred—*Rukma v Shro Dal* 17 A L J 841, 51 Ind Cas 576.

In *asmita* against E and J of whom J died *pendente lite* a decree was passed in 1906 which did not provide that L should be personally liable but declared that the decretal amount should be realised by the sale of the property of J in E's possession. E for the first time obtained possession of J's property in 1914 and the decreeholder applied in the same year to execute the decree. Held that the application was not barred by Limitation, that Art 182 did not apply in as much as the decree was not capable of immediate execution in 1906, that the application for execution could not be made till L got possession of J's property, and that the Article applicable was Article 181, and the right to apply accrued in 1914 when E obtained possession of J's property—*Makrara of Darbhanga v Homeshwar Singh* 6 P L J 132, 133 (P C).

A pre-emption decree is incapable of execution until the decreeholder pays the pre-emption price into Court, and consequently clause 1 of Article 182 is inapplicable, and no other clause in Article 182 being under the circumstances applicable the general Article 181 would apply, and the time for an application for execution of the pre-emption decree commences to run when the price is paid—*Chhedi v Lahu* 24 All 30, *Choudhary v Kahu* 22 O C 82, 52 Ind Cas 156.

When a perpetual injunction has been granted the decree may be enforced on each successive breach of it. An application for execution of the decree falls under this Article and must be made within three years of the date of the particular breach which is the occasion for the application. But the decreeholder is not bound to take action in case of every petty infringement, and the fact that he does not enforce his rights on a petty breach will not deprive him of the fruits of his decree if a serious infringement were afterwards made—*Venkatachellian v Veerappa* 29 Mad 314 (317). See also *Ram Saran v Chalar Singh* 23 All 465 (466) where it is held that Article 182 is inapplicable to an application to enforce an injunction upon its disobedience. It was held in *Sadagopachari v Krishnamachari* 12 Mad 356 (364), and *Goswami Gordhan v Goswami Mahandan* 41 All 648 (651) that an application for execution of a decree for injunction was to be brought within 3 years of the date of the breach of the injunction. In no Article was mentioned in the judgments.

Where by mistake of Court the name of the judgment-debtor has been omitted from the decree the decree is incapable of execution until it is amended and the name of the judgment debtor brought on the record, then it is to apply (under Article 181) for execution accrues from the date of amendment—*Debi Bahsh v Shambhu Dial*, 48 All 281, 24 A L J 256, 21 Ind 1926 All 384.

Where a decree is not executable at once as regards certain matters but leaves them to be subsequently ascertained, the period of limitation would run from that date. Article 181 from the date when they are ascertained, and the decree becomes executable for execution as regards those matters only then—*Rajachalam v. Venkatrama*, 29 Mad. 46 (47). When a decree is for the payment of a certain sum of money composed of three items, one of which has to be ascertained, limitation for execution of the whole decree runs (under the Article) from the date of ascertainment of the unspecified sum—*Lydiantha v. Subramania*, 35 Mad. 104 (107).

Where a money decree was by its terms not capable of execution till after the expiry of six months from the date of the decree, because the judgment-debtor had been allowed the option of paying the decretal money without interest within that period, held that Article 181 applied, and the period of limitation ran after a default was made in the payment of the money—after the expiry of six months from the date of the decree—*Surayman v. Anjori Shukul*, 46 All. 73 (74), 21 A. L. J. 861, following *Maharaja of Darbhanga v. Homeshwar*, 6 P. L. J. 132 (P. C.). Where a decree dated July 1882 directs the plaintiff to deliver certain lands to the defendant in January 1883, before he can recover certain lands from the defendant, limitation runs from January 1883 and not from July 1882—*Narayan v. Vishal*, 12 Bom. 23 (25). Where a decree for redemption provided that the plaintiff would be put into possession upon payment by him to the defendant of the mortgage amount and the value of the improvements to be determined in execution, the decree became a complete decree on the date when the Court determined the value of improvements, and limitation ran from that date—*Irishnan v. Nilakandan*, 8 Mad. 137 (139).

694 **Revival or continuation of previous application for execution:—**A distinction should be made between a new application for execution of a decree and an application which amounts to a revival or continuation of a previous one. And it is now an established rule of law that if the application is to initiate a new execution, it would be governed by Art. 182, and not by Art. 181; and if it is intended merely to revive or carry through a pending execution, it would fall under the provisions of Art. 181 and not of Art. 182—*Subba Chariar v. Muthu Veeran*, 36 Mad. 553 (556). *Chalavadi v. Poloori*, 31 Mad. 71 (75). *Raghubans v. Shoa Saran*, 5 All. 243 (245).

Whether a subsequent application is to be treated as a new application or as a continuation of a prior application, depends upon the circumstances of the case, the intention of the Court, and the nature of the order passed on the prior application.

The principle is, that where the proceedings in respect of an application for execution have been interrupted by the intervention of objections and claims subsequently proved to be groundless, or have been suspended by reason of an injunction or like obstruction, a subsequent application for execution, similar in scope and character, may be treated as in continuation

or revival of the previous application—*Madhabmani v Lambert*, 37 Cal 776 (504); *Ck Ajadhya Nath v Ck Srinath*, 26 C W N 338

The mere fact that a prior application is dismissed does not necessarily render the subsequent application a *fresh* application, so as to make Article 182 applicable to it. For sometimes orders of dismissal are loosely made on applications with the object of removing cases, in which no immediate proceedings can be taken, from the list of pending cases. If the order of dismissal is of this character, a subsequent application is not to be considered as a *fresh* application for execution under Article 182 but as a continuation of the previous application and governed by Article 181—*Lal Gound v Bhikar Sahu*, 20 Ind Cas 439 (411) [Cal], *Kaniz Zobra v Boondi Sahu* 2 P L J. 113 (117); *Ck Ajadhya Nath v Ck Srinath*, 26 C W N 338. The dismissal by the Court of an execution petition without notice to the parties and without removing the attachment is no more than a direction to the officers of the Court to remove the proceedings from the pending list, and has not the effect of closing the proceedings. The proceedings initiated by the decreeholder are pending, and a subsequent application which merely asks for sale of the properties already attached under the prior application is a continuation of the first—*Chalaradi v Poloori Alimelanimak*, 31 Mad 71 (74). The Madras High Court further lays down that if an execution application is pending a subsequent application asking the Court to continue the pending proceeding is not governed by Article 181 or by any other Article, because the right to apply for the continuance of the proceeding accrues from day to day—*Chalaradi v Poloori*, 31 Mad 71 (76); *Sulla Chariar v Muthurera*, 36 Mad 553. *Pullanaya v Pullayya*, 50 M L J 215 A I R 1926 Mad 453. *Pullayya v Pullanayya*, 47 M L J 608. So long as the execution case is pending an application to continue it is not barred by any Article (181 or 182) of the Limitation Act. It may be that where a bar to the further progress of execution proceedings has been created by an order of a Court of competent jurisdiction, such proceedings may only be revived by an application under Article 181 after the removal of the bar, but in a case where the Court intended to and did as a matter of fact maintain an application for execution on its pending file, and stopped proceedings for the time being and did not finally dispose of the application, an application made to the Court for the sole object of drawing its attention to the pending file, so that it may proceed with it, is not governed by any Article of the Limitation Act. An application contemplated by Article 181 is an application required by law to be made, but there is no provision of law which requires a decreeholder to make an application where the sole object is the continuation of proceedings in a pending case. When an application is as a matter of fact pending, the decreeholder has a right every moment to ask for further progress in the matter of the application—*Ikkal Narain v Jagrani*, 28 O C 158, 85 Ind. Cas 450, A I R 1925 Oudh 552.

The dismissal of an application only for administrative or statistical purposes amounts only to a suspension of the proceedings and not to a termination of the proceedings, consequently a subsequent application is to be treated as a continuation of the prior application—*Ayissa v. Abdulla*, 10 L W 613 A I R 1924 Mad 178, 76 Ind Cas 126; *Pattanayya v. Pattayya* 30 M L J 215, A I R 1926 Mad. 453

The mere fact that an execution application is struck off does not by itself indicate the final determination of the execution proceedings—*Manorath v. Ambika* 13 C W N 533 (510) Thus, where the decreeholder applied for execution and it appeared that the judgment-debtor was residing outside the jurisdiction of the Court, and the Court without any application on the part of the decree-holder to transmit the decree to another Court, gave the plaintiff a week to apply for an order of transmission, and, as he did not so apply, struck off the execution application on the 7th day, held that that was not a proper disposal of the application, which should therefore be treated as still pending—*Subrahmanyam v. Rangiah*, 17 M L J 616

If an application for the execution of a decree is struck off or suspended for no act or default of the decreeholder, a subsequent application is considered as a continuance of the previous one—*Bhagwanth v. Zamir Ahmed*, 3 Pat 596, *Akhil Husain v. Qudrat Ali*, 26 O C. 206, A. I. R. 1924 Oudh 31; *Qamaruddin v. Jawahir*, 27 All 334 (P C); *Majibulla v. Umad Bibi*, 30 All 499 (504), *Ram Lakhan v. Meera Lal*, A I R. 1922 All 433; *Rajant Bandhu v. Kafi Prasanna*, 74 Ind Cas 279 (Cal)

Where the order of the Court on an execution application is merely an order of striking off and not an order finally disposing of it, a subsequent application for execution must be treated as one to revive and carry through the pending execution-proceeding which was merely suspended, and is not an application to initiate a new execution—*Qamaruddin v. Jawahir*, 27 All 334, 338 (P C)

Where execution proceedings are stayed at the instance of the judgment-debtor, and the case was struck off the file "for the present" and for the convenience of the Court, a second application for execution was one in continuation of the former proceedings—*Baskantha v. Aghore Nath*, 21 Cal 387 (391) Where the sale in execution could not take place owing to absence of bidders, and the decreeholder was ordered to pay fees for fresh sale-proclamation, which the decreeholder did not pay, and thereupon the application for execution was struck off "for the present," held that the words "for the present" in the Judge's order showed that the proceedings did not come to an end but were merely kept in abeyance, that the attachment still continued, and that the next application for execution made by the decreeholder would be treated as one for revival of the former proceedings—*Majibulla v. Umad Bibi*, 30 All 499 (502). It was further held in this case that as the decreeholder was not bound by law to pay the

costs of the fresh sale proclamation, the dismissal of the previous application could not be said to be a termination of the proceeding in consequence of the decreeholder's omission to do something which he was bound to do, and therefore the subsequent application could not be treated as a *fresh* application for execution—*Ibid* (at p 504) But in a Calcutta case where the original application was dismissed owing to the decreeholder's omission to deposit the costs for service of a fresh sale proclamation, and then nearly three years afterwards he made another application, *held* that the subsequent application was not a continuation of the previous application, in as much as the decreeholder remained quiescent for a long period, and also because there was a clear break in the continuity of the proceedings by reason of the decreeholder's omission to deposit the costs, and thereby the previous proceedings came to an end—*Dhukhirani v Jogendra*, 5 C. W. N. 347 (349)

If a prior application is dismissed for default of appearance, a second application is a new application, and not a continuation of the first one—*Akmal Khan v Gaura*, 40 All 235 (237)

Where the previous execution proceedings had been struck off upon satisfaction being entered on the decree, a second application for execution was not a continuation of the previous application, because the former proceedings had been properly and finally disposed of—*Khairunissa v Gauri*, 3 All 484 (487) Where the prior proceeding for execution was struck off owing to the decreeholder taking no steps, the subsequent application for execution was not a continuation of the prior proceeding—*Karish Chandra v Nilmani*, 20 C W N 686, 32 Ind Cas 931 (933) But where in consequence of a suit being brought by certain persons who objected to the attachment, the application for execution was struck off and the sale of the attached property was postponed, *held* that the application was merely suspended and a subsequent application by the decreeholder after the termination of the suit was a continuation of the previous application—*Sheo Prasad v Indar*, 30 All 179 (180)

Where a decreeholder applied for the sale in execution of five villages of his judgment-debtor, and two villages were sold and the decree satisfied, but subsequently at the instance of another person the sale was held to be a nullity, whereupon the decreeholder made another application for sale of the remaining three villages, praying that as the sale of the two villages had been declared to be a nullity, the prior application should be proceeded with, and that the three villages which it was not then necessary to sell by reason of the sale proceeds of the two other villages being sufficient to satisfy the decree, should now be sold. *Held* that this was in substance an application to take proceedings in continuation of the previous application and was governed by Article 181, and not by Article 182 Time ran from the date when the sale was declared to be a nullity—*Dihari v. Jagannath*, 28 All 651 (653) An application for execution of a

decree was made in 1917 and two properties were sold in 1918; but in 1919 a third person *F* sued the decreeholder and the judgment-debtor and got the sale set aside in respect of one of the properties, and in 1920 the judgment debtor got the sale of the other property set aside on the ground of irregularity. The decreeholder again applied in 1921 for execution of his decree. Held that by reason of the litigation which took place after the sale the execution proceedings could be said to have been revived, and the present execution application must be regarded as a continuation of the previous execution proceedings. Article 181 applied, and time ran from the date on which the sale was set aside either in 1919 or in 1920, and in either case the application was in time—*Radha Kishan v. Kashi Lal*, 2 Pat 829 (832). *Issuree v. Abdul Khalek*, 4 Cal 415.

Where a previous application for execution was dismissed because of a successful application under O. 21, rule 90, a subsequent application for execution is one in continuation of the previous application. But where a previous application was made against one only of several judgment-debtors and has been dismissed for that reason, a subsequent application made against all the judgment-debtors cannot be treated as an application in continuation of the previous application, the previous application being *ab initio* a bad application, the subsequent application is not one made in continuation of it—*Hamal Nain v. Kesho Prasad*, 1 Pat 701 (704), 4 P. L. J. 226.

Where upon an application being made for the execution of a decree a property was sold, but the sale was set aside at the instance of the judgment debtor, a second application for execution by sale of the identical properties is one in continuation of the previous application—*Kanti Zohra v. Boondi Sahu*, 2 P. L. J. 115 (116).

When an application for execution is struck off the file, in pursuance of an understanding between the parties to the effect that if negotiations for a compromise should fail the decreeholders should be at liberty to present a fresh application, an application for execution after the failure of such negotiation must be considered as one for the revival of the old execution proceedings—*Venkatray v. Hajesingh*, 10 Bom. 108 (111).

Where an application for execution of a rent-decree was made and the sale took place, but on the application of the judgment-debtor the sale was set aside, and the execution case was dismissed for default as the decree holder took no further steps, it was held that the execution proceeding came to an end, and a subsequent application for execution filed by the decreeholder was not a continuation of the previous application as there was no continuity between the two applications—*Midnapore Zemindary v. Dinanath*, 22 C. W. N. 766, 45 Ind. Cas. 712.

Where the original decree holder died pending his application for execution, leaving a major and a minor son, and the major son applied to execute the decree as the legal representative of the deceased decree-

holder, but he too died pending his application and the execution application originally preferred by the decree holder was struck off on the report of the decree holder's exlil that he had no instructions and more than three years thereafter the minor son made an application for execution in continuation of the previous execution application it was held that as the original application for execution was dismissed as infructuous the order of dismissal had disposed of the whole matter for the time being, and that the second application was a *fresh* application for execution (and not in continuation of the previous one) and having been presented more than three years after the disposal of the prior application was barred—*Pals Lam v Aoidas*, 41 All 435 (439-440)

In order that the subsequent application may be treated as a continuation of the previous one, it is necessary that the second application must be similar in scope and character to the previous one—*Madhalmuni v Lambert* 37 Cal 796 (804) So a subsequent application cannot be treated as a revival of the prior application, if the relief claimed in the two applications are entirely different Thus where the second application was for arrest of the judgment-debtor while the previous application had proceeded against his property, it was held that the second application was a fresh application and could not be regarded as a continuation of the previous proceeding, as it was perfectly distinct in its nature from the former one—*Lira and v Atli*, 7 Mal 595 (597) ; *Krishnayi Raghunath v Anandray Ballal* 7 Bom 293 (297) ; *Lalumia v Markur*, 93 Ind Cas 718 A I R 1926 Mad 628 *Ram Sircendra v Awadh Behari* 4 P I T 205 A I R 1923 Pat 159, *Har Sarup v Balgwind*, 18 All 9 (11) If the second application for execution asks for the attachment of properties other than those which were proceeded against in the proceedings instituted by the previous application the second application is to be treated as a *new* application and not as a continuation of the previous one—*Chalatadi Kotiah v Poloorti* 31 Mad 71 (73), *Raghunundan v Bhugoo* 17 Cal 268, *Sreenath v Yusof* 7 Cal 556 (559), *Bashantha v Aghorenath* 21 Cal 387 (391)

When execution proceedings were stayed by injunction or prohibitory order, it was held under the Act of 1877 that an application for execution made after the removal of the injunction was to be regarded as an application for revival of the former proceedings under Art 181 and not as a fresh application under Art 182 and the period of limitation for this subsequent application would run from the date of removal of the injunction—*Basant Lal v Datal Bibi* 6 All 23, *Amulya v Preo* 7 Ind Cas 886, *Madhab Mani v Lambert*, 37 Cal 796, *Ghulam Nashiruddin v Hardeo*, 34 All 436 (441), *Sakina v Ganesh* 3 P L J 103 (105), *Bibi Hajo v Harsahai*, 7 P L T 39 A I R 1926 Pat 62, *Kalyanbhai v Ghanesham* 5 Bom 29, *Narayan v Sono* 24 Bom 315, *Chintaman v Balshastri* 16 Bom. 203, *Issuree v Abdul* 4 Cal 415 *Lutfid v Shumbhudra* 8 Cal 248, *Hurronath v Chunni* 4 Cal 877, *Chandra v Gopimohan* 14 Cal

385 (38) *Ahrjudhan v. Bispi Behari* 30 Cal 407 (411); *Gurudeo v. Amrit* 33 C L 189; *Huddar v. Dhanpal* 26 All 156 (159); *Lakshmi v. Ballan* 1 All 15 (1) *Rungiah Goundan v. Nanjappa*, 26 Mad 780 (187) *Thiruvitham v. Shulayammal* 11 Mad 103 (105). It should be noted that many of these cases were decided under the Act of 1877, in which section 15 applied only to suits and did not apply to an application for execution of a decree. Under the present Act all the cases relating to injunctions etc. would fall under Article 182, and the time during which the execution was stayed by the injunction or prohibitory order would be excluded from computation under section 15, which now applies to applications for execution of decrees. See 34 All 436 at p. 442.

Similarly where the execution of a decree was ordered to be stayed pending an appeal from the decree and the execution proceedings struck off a subsequent application for execution of the decree after dismissal of the appeal was regarded as one for the revival of such proceedings, and was held to be governed by this Article—*Buti Begam v. Nihal Chand* 5 All 459 (461) *Raghubans v. Sheo Saron*, 5 All 243.

Where an application to execute an *ex parte* decree was struck off the file on the application of the judgment-debtor to set aside the decree, and the decree holder filed another application after the rejection of the judgment-debtor's application for rehearing of the suit, it was held that the decree holder's second application for execution was only a continuation of the previous proceedings that had been suspended—*Chandra v. Gopi Mohan* 14 Cal 385 (387).

Where the decree holder is obstructed by violence or fraud, and a litigation is necessary to get rid of such obstruction, the execution is suspended owing to such litigation and a second application made after the termination of such litigation would be a continuation of the first—*Karliah v. Nilmoni* 20 C W N 686, 32 Ind Cas 931 (932).

Where a property attached in execution is released on the claim of a third party against whom the decreeholder has to institute a regular suit, an application for execution against that property made by the decree holder after succeeding in the suit is to be regarded not as a fresh application, but as a revival of the previous proceedings and governed by Article 181, and the period of limitation runs from the date of the decree in the claim suit and not from the date of the previous application—*Paras Ram v. Gardner*, 1 All 355-357. (F B). *Baboo Pyaroo v. Syad Nazir*, 23 W. R. 183. *Rudra Narain v. Panchu Maini*, 23 Cal 437 (440). This principle applies equally to the case of an attachment before judgment. Thus, where certain properties of the defendant in a money suit were attached before judgment, and after a decree was obtained in that suit, a claim petition was put by in a third party and allowed, and the decree holder consequently filed a suit to establish his right to sell the properties

in execution and obtained a decree in his favor an application by the decreeholder for the sale of the properties attached before judgment was governed by Article 181 and not by Article 182 and the period of limitation ran from the date of the decree in the latter suit and not from the date of the decree under execution—*Suryya v. Lakshataram* 47 Mad 176 (179) 1861 43 M. L. J. 512 70 Ind. Cas. 409.

But where the objector's claim is two thirds of the attached property having been allowed the attachment of two thirds of the property was raised and the decreeholder filed a regular suit against the objector, but he was unsuccessful in that suit, and then he made a second application for execution praying for attachment of the one third share which was not released from attachment. It was held that as the property sought to be attached and sold in the second application was one which the decreeholder might have proceeded against, notwithstanding the order in the claim proceedings held that the second application was not a continuation of the previous proceeding for execution—*Paghnundaw v. Bhugoo* 17 Cal 268 (271).

Where the decree holder has failed to remove the obstacle (if the claim put in by the third party) to his executing the decree the second application cannot be treated as a revival or legal continuance of the first—*Shivaram v. Sarasahai* 20 Bom 173 (178); *Khairunnissa v. Gauri Shankar*, 3 All 484, *Gangai v. Mehera* 30 P. R. 1892.

An application for execution by the assignee of a decree was dismissed on the objection of the judgment debtor that the assignment was for the benefit of the judgment debtor and that the assignee was therefore not entitled to execute the decree. The assignee thereupon brought a suit to establish her claim that the assignment was for her own benefit, and she obtained a decree declaring that she had obtained a valid assignment and establishing her right to execute the decree. She then applied again to execute the decree. It was held that the second application was one to revive or continue the previous application—*Suppa Reddia v. Avudai Ammal*, 28 Mad 50, 53 (F. B.).

In June 1892, an application was made for execution of a decree and was dismissed, the applicant being relegated to a suit to establish his rights. He did not sue, but in September 1892 he put in a fresh application to execute which was dismissed, as he had not chosen to bring the suit as directed. He then sued, and in March 1893 a decree was passed in his favour. He now put in a petition in October 1893 praying that his petition of September 1892 be revived or continued. It was held that as the last application of September 1892 had not been merely suspended but finally and properly dismissed, the present petition should be treated as a fresh application (and not as a continuation of the first) and therefore barred—*Suryanarayana v. Gurunada* 21 Mad 257 (260).

Within 3 years from the time fixed in a preliminary decree for sale on a

mortgage the decree holder made an application for a final decree but the application was returned for a correct statement of the amount due and for a proper description of the mortgaged property. No time was fixed for the amendment and the decree holder presented his amended application more than 3 years after the time fixed in the preliminary decree. *Held* that this application was a continuation of the previous application and was not barred—*Kallu Ma' v Kashi Nath* 20 A L J 580 A I R 1911 All 446 68 Ind Cas 175

An objection to attachment was made by the judgment-debtor and disallowed. He appealed and while the appeal was pending the decree holder made another application for execution. The Court struck off the application on the ground that it was impossible to proceed with it in the absence of the record which was in the appellate Court. The decreeholder filed a third application within three years after the return of the record from the appellate Court though more than three years after the previous application. *Held* that this last application was a continuation of the previous application and time ran when the appeal was disposed of and the records were returned. The application was therefore in time—*Raghubans v Sheo Saran* 5 All 243 (244)

694A Limitation in respect of such application.—Where an application is made to continue proceedings in a pending execution the right to apply accrues from day to day and will not be barred until 3 years have elapsed after the proceedings have ceased to be pending—*Subba Charlar v Anantharavan* 36 Mad 553 (557) *Puttayya v Puttanayya* 47 M L J 608 A I R 1925 Mad 152 *Chalavadi v Poloor Alimelaramah* 31 Mad 71 (76) *Pattanaya v Pattaya* 50 M L J 215 *Kedar Nath v Harra Chand* 8 CIL 420 *Ikkal Narain v Jagram* 28 O C 158 A I R 1925 Oudh 552

Where a sale held in execution of a decree was set aside and the decree holder was ordered to refund the purchase money a second application for execution of the decree was governed by this Article and time ran not from the date on which the sale was set aside but from the date on which the decreeholder was ordered to refund the purchase money to the purchaser for till then he had no right to call upon the judgment-debtor to pay his judgment-debt a second time—*Raminreddi Venkata v Lakhoju Chinn* 30 Mad 209 (212)

In execution of a mortgage decree the mortgaged property was sold and the judgment-debtor purchased it *benami*. The decree holders made an application in November 1891 to set aside the *benami* purchase and resell the property. The first Court found that the purchase was not *benami* and confirmed the sale in April 1892 but this decision was reversed on appeal in 1893. The decree holders thereupon made another application for execution and re-sale of the property in December 1894. It was held that this application might be regarded as a continuation of the application of November 1891 for re sale of the property and as the decree holders

were precluded by the first Court's finding of 12th April 1892, from asking for sale until it was reversed on appeal in 1893 the application was in time under this Article—*Paghunath v Jalji* 23 Cal 397 (402)

If the judgment-debtor prefers an objection to the attachment of the property, the period of limitation in respect of the decree holder's second application for execution runs as soon as the judgment-debtor's objection is dismissed whether by the Court of first instance or on appeal. If the judgment-debtor's objection is allowed by the Court of first instance, but is dismissed on appeal the right of the decreeholder to apply for a second time accrues from the date of the appellate decree recognizing his right to execute the decree—*Suppa Redhar v Atudai* 28 Mad 50 (53) F B. If the judgment-debtor's objection is dismissed on appeal limitation would run from the date of the appellate decree and the fact that the judgment debtor has preferred a second appeal to the High Court will not postpone the running of time—*Rudder v Dhanpal* 26 All 156 (159), *Chakraborty v Poloor* 31 Mad 71 (73) *Kartick v Nilmoni* 20 C W N 686 32 Ind Cas 931. If the judgment-debtor's objection is dismissed by the Court of first instance time runs from the date of the decree of that Court, and the pendency of an appeal by the judgment-debtor from such decree cannot give the decreeholder a right to defer execution until the disposal of such appeal.

So also, if a third party prefers an objection to the attachment and sale of the property, and the objection is allowed, in consequence of which the decree holder has to institute a suit against him the period of limitation runs as soon as the decree holder gets a decree in his favour in that suit, and the subsequent application must be made within three years from that period. The fact that that person has preferred an appeal and that appeal has been dismissed will not entitle the decreeholder to count the period of limitation from the date of the appellate decree. Thus an application for execution of a mortgage decree was made and granted, but subsequently an objection was filed by a third person and allowed. The decree holders then sued the intervener and in 1888 obtained a decree declaring that the property was liable to be sold under the mortgage decree. An appeal was preferred by that person which was dismissed in 1891. An application by the decree holders for execution was again made in 1892. It was held that this application was barred on the ground that the right had accrued to the decree holders to apply for execution or proceed with their application immediately on the passing of the decree in their favour in 1888 and not on the passing of the appellate decree in 1891—*Desraj v Karam*, 19 All 71 (76). But in another Allahabad case, where the objector's suit was dismissed by the Court of first instance but decreed on appeal and was finally dismissed by the High Court in second appeal it was held that the final decision of the High Court in decreeholder's favour had the effect of reviving the decreeholder's previous application.

for attachment and sale—*Sheo Prasad v Indar*, 30 All 179 (181). But this was merely an obiter. In *Narayan v Sono* 24 Bom 345 (349) a decreeholder who got a decree for khas possession applied for execution, but was obstructed by a son of the defendants and the decreeholder had to institute a suit against him. The suit was disposed of in favour of the decreeholder by the Court of first instance (but this order was passed somewhat irregularly) and this order was finally confirmed by the High Court. The decreeholder then applied again for execution within three years of the order of the High Court. Held that this application was not barred, as time ran from the date of the order of the High Court and not from the date of the order of the Court of first instance which was somewhat irregular and opposed to rule.

Where execution is stayed by an injunction, limitation will commence to run as soon as the order granting the injunction is withdrawn. If the injunction comes to an end by order of the Court of first instance, limitation will run from the date of the order of that Court, and the fact that an appeal has been preferred by the other party from that order will not entitle the decree holder to deduct the time of pendency of the appeal—*Balwant v Rudh Singh*, 42 All 564 (566), *Madho Prasad v Draupadi*, 43 All 383 (386). If the injunction comes to an end by the order of the appellate Court, the time for making a fresh application runs from that date, and the fact that there was an appeal to the High Court will not entitle the decreeholder to calculate the period from the date of the decree of the High Court confirming the lower appellate Court's order—*Rudder v Dhanpal* 26 All 156 (161).

695. Other applications.—A money-decreeholder and his judgment debtor agreed that the amount of the decree should be payable by instalments and that if default were made in payment of any one instalment the whole decree should be executed. The Court sanctioned this agreement. A default having been made by the judgment-debtor, the decreeholder applied for recovery of the whole amount of the decree. Held that the application of the decreeholder was one to enforce the agreement rather than an application for execution of the decree in the strict sense of the term and therefore Article 181 and not Article 182, applied. Time ran from the date of the default—*Sham Karan v Piart*, 5 All 596.

Where an instalment decree nisi was passed in a mortgage suit, and it provided that a certain sum should be paid every year in *Jeth*, and that if default were made for three years in succession in the payment of the instalments the decreeholder would be at liberty to recover at once the whole amount, i.e. to apply for an order absolute for sale of the property, held that none of the clauses (not even clause 7) in the third column of Article 182 applied to the case, and that Article 181 was the proper Article applicable to an application for enforcement of the instalment decree by an order absolute for sale, and the right to apply for an order absolute

for sale accrued on the occurrence of the third consecutive default—*Badri Narayan v Kunj Behari* 35 All 178 18 Ind Cas 731

An application by a judgment-debtor for restoration of immoveable property seized by the decreeholder in excess of what has been decreed is governed by this Article and not by Article 165 because that Article does not apply to an application by a judgment debtor—*Abdul Karim v Islamunnissa* 38 All 339 See this case and several other cases cited in Note 68 under Article 165

Where a sale held in execution of a decree was set aside at the instance of the judgment-debtors and possession was restored to them an application made by them to recover compensation for the period during which they were kept out of possession is governed by this Article as it is an application under the C P Code (sec 144) or at least contemplated by the C P Code and must be made within three years from the restoration to possession—*Jagdish v Holloway* 2 P L J 206 (208)

Where pending an appeal to the Privy Council some of the parties died and their legal representatives were not brought on the record before the decree an application to add the representatives as parties to the decree falls under this Article and the right to apply accrued from the date of the decree—*Kalyan v Tiruvengadaswami* 47 Mad 618 47 M L J 154 A I R 1924 Mad 695 80 Ind Cas 85

An application by a creditor of an insolvent to prove his debt and to have his name inserted in the Schedule was governed by this Article as it was an application under sec 352 of the C P Code of 1882 the right to apply accrued from the declaration of the insolvency—*Parshad Lal v Chuni Lal* 6 All 142 (144)

An application by a creditor under sec 37 of the Prov Insolvency Act (1907) for a declaration that a sale made by the insolvent within 3 months prior to the application for adjudication is null and void as against the Official Receiver is governed by this Article and the starting point of limitation would be the date on which the debtor was adjudicated an insolvent—*Nikka Mal v Marwar Bank Ltd* 1919 P R 151 52 Ind Cas 188 But it is doubtful whether Article 181 would apply as it is not an application under the C P Code See *Purthi Nath v Basheshar* 69 Ind Cas 403 (Lah)

Application for extension of time to pay mortgage debt—A mortgagor obtained a redemption-decree in 1907 ordering the mortgagor to pay money and redeem within six months Nothing was paid under the decree The mortgagor then assigned his interest to G who applied in 1915 to be allowed to pay the money and redeem It was held that the application was to be treated as one to extend time for payment of the mortgage-debt and not being provided for elsewhere fell under this Article and was barred as the right to apply accrued on the date of the decree or at the latest on the expiry of the period of 6 months fixed for the pay

Even assuming that it was not merely an extension of time for payment of the mortgage-debt but a sale of the property as in terms it purported to be, the application for execution of the redemption-decree and as such was usually treated under Art. 18—*Tasuder v Gopal* 43 Bom 680 (1907).

Application for refund of money.—An application by a purchaser for refund of purchase money where the sale has been set aside as void upon a suit brought by the judgment-debtor falls under this Article, and time runs from the date of the final order passed by the High Court in second appeal setting aside the sale—*Gudham v Sital Prasad* 11 All 372 (1904).

So also an application by an auction-purchaser, who has failed to obtain possession of the property purchased owing to the judgment-debtor having no saleable interest in the property for removal of the purchase money after setting aside the sale, is governed by Article 186 so far as the setting aside of sale is concerned and by Article 181 in respect of refund of purchase-money—*Mahar Ali v Sarfuddin* 30 Cal 115 (see the case cited in Note 67) under Article 186).

Where an *ex parte* decree under which the decree holder realised the decretal amount, was afterwards set aside, and after retrial of the suit another decree was passed by which the original decretal amount was reduced by a certain sum, an application by the judgment-debtor for refund of the excess amount (i.e. the difference between the sum realised by the decreeholder and the sum finally decreed) fell under this Article. The right to apply accrued upon the passing of the latter decree—*Bisbal v Jamna* 30 All 476 (1908).

The judgment-debtors against whom a decree had been executed, applied for refund of the money which they alleged had been recovered in execution by the decree holder in excess of what was actually due. Upon this application an account was taken by order of Court. The judgment-debtor then applied to the Court for an order upon the judgment creditor to refund the excess. It was held that this Article applied to the application, and time began to run when the account was taken (and not when the excess amount had been paid to the decreeholder)—*Mula Ray v Debi Dihal* 7 All 371 (1902).

Application for ascertainment of mesne profits.—According to the Calcutta High Court an application for ascertainment of mesne profits (under the old C. P. Code) is not governed by any rule of limitation either under Article 181 or Article 182 because it is the duty of the Court to ascertain the mesne profits awarded by a decree without any application being made—*Puran Chand v Roy Radhakishen* 19 Cal 137 139 (F B). This view was followed by the Allahabad High Court in *Waliya Bibi v Nasir Hasan*, 26 All 623 and *Md. Umarjan v Zinet*, 25 All 385. But

the Madras and Bombay High Courts were of opinion that under the old Code if the decree directed that the mesne profits should be ascertained in execution the application for the ascertainment of mesne profits was an application in execution and the limitation applicable to such application was that applicable for execution applications viz Art 182—*Ramana Reddi v Rahu Reddi* 37 Mad 186 (199) *Gangadhara v Balakrishna* 45 Bom 519 (8-6)

But after the passing of the new C. I. Code of 1908 the ascertainment of mesne profits has been made a part of the suit and in continuation thereof. Such a proceeding is no longer a separate proceeding and an application for ascertainment of mesne profits is no longer an application in execution consequently Article 181 would now apply to such application—*Harakhpan v Jagdeb* 4 Pat 37 3 P. L. T. 626 A. I. R. 1924 Pat 81 84 Inl Cas 272, and the right to apply accrues when the delivery of possession is given or from the date of the preliminary decree—*Ibid*. But the Bombay High Court still adheres to the old view (viz that Article 182 applies)—*Yusuf Ali v Sayad Amin* 47 Bom 778 25 Bom L. R. 810 73 Inl Cas. 233 A. I. R. 1923 Bom 366 (following 45 Bom 819)

Application for restitution —See Note 699 under Article 182

696 *Application by Government* —Government is not entitled to exemption from the provisions of the Limitation Act relating to applications. Therefore an application by the Government under sec 411 of the Code of Civil Procedure (1882) to recover the amount of Court fees from a party ordered by the decree to pay the same is subject to the provisions of this Article—*Appaya v Collector of Nagaputani* 4 Mad 155 (156)

697 *Application by minor* —Section 6 refers only to an application for the execution of a decree and does not apply to an application under this Article. Consequently a minor in making an application for a final decree for sale on a mortgage (which is now governed by this Article) cannot get the privilege of section 6—*Vizamuddin v Bohra Bhim Sen* 10 All 203 (205), *Vinayakrao v Baijnath* 15 D. L. R. 36

182 —For the execution of a decree or order of any Civil Court not provided for by Article 183 or by section 48 of the Code of Civil Procedure, 1908	Three years or where a certified copy of the decree or order has been registered,	1 The date of the decree or order, or
	six years	2 (where) there has been an appeal) the date of the final decree or order of the Appellate Court or the withdrawal of the appeal, or

182 —For the execution of a decree or order of any Civil Court not provided for by Article 183 or by section 48 of the Code of Civil Procedure 1908 — <i>Contd</i>	Three years or where a certified copy of the decree or order has been registered six years	<p>3 (where there has been a review of judgment) the date of the decision passed on the review or</p> <p>4 (where the decree has been amended) the date of amendment or</p> <p>5 (where the application next hereinafter mentioned has been made) the date of applying <i>applying</i> in accordance with law to the proper Court for execution or to take some step in aid of execution of the decree or order or</p> <p>(where the notice next hereinafter mentioned has been issued) the date of issue of notice to the person against whom execution is applied for to show cause why the decree should not be executed against him when the issue of such a notice is required by the Code of Civil Procedure 1908 or</p> <p>(where the application is to enforce any payment which the decree or order directs</p>
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to be made at a certain
date) such date

Explanation 1 —Where the decree or order has been passed severally in favour of more persons than one, distinguishing portions of the subject-matter as payable or deliverable to each, the application mentioned in clause 5 of this Article shall take effect in favour only of such of the said persons or their representatives as it may be made by. But where the decree or order has been passed jointly in favour of more persons than one, such application, if made by any one or more of them, or by his or their representatives, shall take effect in favour of them all.

Where the decree or order has been passed severally against more persons than one, distinguishing portions of the subject-matter as payable or deliverable by each the application shall take effect against only such of the said persons or their representatives as it may be made against. But where the decree or order has been passed jointly against more persons than one, the application if made against any one or more of them or against his or their representatives, shall take effect against them all.

Explanation II —“Proper Court” means the Court whose duty it is to execute the decree or order.

This Article corresponds to Art. 179 of Act XV of 1877.

698 Change —In clause 2 the words or the withdrawal of the appeal are newly added. Clause 4 is new. Clauses 5, 6 and 7 correspond to clauses 4, 5 and 6 respectively of Article 179 of the old Act.

The law of limitation applicable to proceedings in execution is not the law under which the suit was instituted but the law in force at the date of the application for execution. Therefore where the suit had been instituted under the Act of 1871 but the application for execution of the decree was made when the Act of 1877 came into operation the application would be governed by the latter Act—*Gurupadapa v Virbhadrappa* 7 Bom. 459, *Kuppu v Saminath* 18 Mad. 482, *Becharam Dutta v Abdul Wahed* 11 Cal. 55 (dissenting from *Behari Lal v Gobardhan* 9 Cal. 446), *Jagmohun Mahto v Luchmessur Singh* 10 Cal. 748.

699 Applications under this Article —An application made to obtain restitution under a decree in accordance with section 583 of the old C. P. Code (1882) is a proceeding in execution of that decree and is governed by this Article—*Venkaya v Raghavachariu* 20 Mad. 448,

82 52 Ind Cas 157 Mr Rustomjee is of opinion that such decree is capable of immediate execution as it is open to the decreeholder to pay the price on the day the decree is passed and therefore an application for execution comes within clause 1 of Art 182—*Rustomjee's Limitation* 3rd Edn p 73 Where there was a direction in a pre-emption decree that the purchase money should be deposited in Court within 31 days from the date of its being final the decree did not become final until the time for the appeal allowed by law had expired or if appealed from had been decided by the ultimate appellate Court—*Sheikh Ewa v Mohuna Bibi* 1 All 132 *Pamsahai v Gaya* 7 All 107

702 Date of the decree.—The date of the decree is the date on which the judgment is pronounced (O 20 rule 7 of the C P Code) and not the date on which the decree is actually prepared and signed by the Court—*Afzul v Umda* 1 C W N 93 *Rakhal v Jogendra* 10 C L J 467 *Surajdeo v Musahroo* 1 P L J 359 *Hiralal v Jamuna Prosad* 5 P L J 490 *Golam v Goljan* 25 Cal 109 *Narsingrao v Bando* 42 Bom 309 (317) and the fact that the Court fee required to be paid in order to validate the decree (which was passed in a suit for accounts) was not paid till some months later would not give a different starting point nor would the payment of Court fee constitute a step in aid of execution within the meaning of clause 5—*Bhajan v Girish* 17 C W N 959

Time runs from the date of the final decree. Thus a decree for sale on a mortgage was passed against several defendants jointly on the 25th August 1900 and made absolute on the 21st December 1901. As against one of the defendants the decree was *ex parte* and it was set aside as against her on the 11th March 1902. Subsequently a decree was passed on the merits against her also on November 16 1904 and it was made absolute on November 27 1905. Held that the latter decree supplemented and completed the decree previously passed and limitation for execution ran from the date of the latter decree (Nov 27 1905) that being the date of the decree under this clause—*Ashfaq Husain v Gouri Sahai* 33 All 264 (P C)

703 Clause (1)—Appeal.—A decreeholder is entitled to wait until the decision of the lower appellate Court before applying for execution of the decree of the Court of first instance and the period of limitation runs from the date of the decree of the lower Appellate Court—*Krishna Lal v Satyabala* 51 Cal 342 81 Ind Cas 569 A I R 1924 Cal 686 Time is to be calculated from the date of the appellate decree whether that decree affirms or modifies or sets aside the original decree—*Mid Mehdi v Mohini Khatia* 34 Cal 874 *Krishnaswami v Marigammal* 26 Mad 91 (95) *Sahu Nandlal v Sahu Dharam* 48 All 377

The words where there has been an appeal mean where a memorandum of appeal has been presented to the proper Court and not where the memorandum has been presented and admitted. Therefore if a

memorandum of appeal was rejected for non payment of additional court fees declared to be leviable thereon limitation would still run from the date of the Appellate Court's order of rejection—*I up Singh v Mukharaj Singh* 7 All 587 *Patanta Kumar v Munjuri* 74 Ind Cas 670 (Cal)

It is sufficient that an appeal has been presented and heard to bring the case under this clause although the appellate Court may have decided that no appeal would lie—*Hare Mohan v Ishu Singh* 9 Cal 100 (But the Allahabad High Court holds contra in *Sahu v Andial v Sahu Dikram* 45 All 377) So also a decree of the Appellate Court dismissing the appeal as barred by limitation will give a fresh starting point of limitation—*Ashok v Chander Mehar* 16 Cal 250 Similarly an order of the Appellate Court dismissing the appeal for default of prosecution or by reason of the appellant not pressing the appeal is an appellate order within the meaning of this clause—*Ragho Prasad v Jadunandan* 6 P L J 27 *Fazlur Rahman v Shah Mahammad* 30 All 385

The word appeal means not only an appeal from the original decree but also an appeal against an order passed in review of the original judgment—*Narsing v Madhu* 4 All 274 But it does not contemplate an appeal against an order of dismissal of a petition for review of judgment because such an appeal does not lie—*Ram Ratan v Upendra* 11 R 1923 Cal 288 68 Ind Cas 717 So also the word appeal does not contemplate an appeal from an order dismissing an application made by the judgment debtor to set aside the original decree (which was passed *ex parte*) because the infructuous efforts of the defendant to set aside the *ex parte* decree obtained by the plaintiff cannot have the effect of extending the period within which the plaintiff is allowed by law to execute his decree—*Juaji v Ranchandra* 16 Bom 123 (dissenting from *Luful v Sumbhudri* 8 Cal 246), *Shoo Prasad v Anrudh* 2 All 273 *Raj Brijaraj v Nauratan* 3 P L J 119 44 Ind Cas 575 *Baikantha v Aghore* 21 Cal 387 *Jabarkhan v Rahim Khan* 18 D L R 190

An order of the High Court in *revision* modifying the decree of the first Court is an order in appeal according to the Calcutta High Court and time runs from the date of the order—*Gurnpada v Tarit Bhusan* 22 C W N 158 44 Ind Cas 141 But the rejection of a revision petition without summoning the respondent cannot enlarge the time because such an order is not an appellate order—*Mastan v Pahlwan* 81 P L R 1909 4 Ind Cas 619 According to the Madras High Court the dismissal of a revision petition cannot give a fresh starting point but if the High Court accepts the petition and interferes in revision it either passes a decree which may be executed under clause 1 of this Article or the case is sent down with a direction to the lower Court to amend its decree The latter appears to be the regular course and in such event either clause (1) or clause (4) applies—*Subramania v Seelai Ammal* 36 Mad 135 (137)

the sureties of the defendants have been held to run from the date of the Appellate decree, even though the sureties were not parties in the appeal—*Cholaappa v Pamchandra* 44 Bom 34 (40 47)

704 Withdrawal of appeal.—The words 'or the withdrawal of appeal' have been newly added to this clause to remove the conflict of decisions which existed under the Act of 1877 as to whether the withdrawal of an appeal did or did not give a fresh starting point for limitation. In the case of *Ramaraja v Lakshmi* 30 Mad 1 (17 B) it was held that the withdrawal of the appeal gave a fresh period, whereas the contrary opinion was expressed in the cases of *Pilofji v Ganu* 15 Bom 370 *Chudisama v Mohant Iswargar* 16 Bom 243 *Abdul Moidin* 22 Bom 500 (17 p 506) *Bhagwan v Mohan Lal* 51 P R 1908 and *Kanara v Goind* 1 M I J 745. These 5 cases are now superseded.

705 Clause 3—Review of judgment.—Owing to the absence of any provision in the old Act as regards amendment of decree it was held in some cases that the term 'review of judgment' in this clause included amendment of decree—*Kali Prasanna v Lal Mohan* 25 Cal 258 *Venkata Jogayya v Venkata Simhadri* 24 Mad 25 (16). Under the present Article a separate provision has been made in clause 4 for amendment of decree.

In order to save limitation there must have been actually a review or a mere application for review or a refusal of the application for review cannot give a fresh starting point—*Kurupani v Sadasiva* 10 Mad 66 *Maslan v Pahlwan* 81 P L R 1909 4 Ind Cas 629. An order dismissing an application for the rehearing or review of a suit which has been dismissed for default is not a review of judgment—*Raj Brijraj v Nauratan* 3 P L J 119 44 Ind Cas 575.

As in the case of appeal so in the case of review or amendment of decree, it may be said that if only a part of the decree is sought to be reviewed or amended limitation is saved as regards the whole decree. The intention of the Legislature is to treat the decree as a whole although only a part may be the subject of an appeal or an application for review of judgment or amendment of decree. Limitation runs with respect to the execution of the whole decree only when the proceedings in appeal review or amendment come to an end—*Vydsanatha v Subramania* 36 Mad 104 (106).

706 Clause 4—Amendment of decree.—This clause has been introduced for the first time into the Act of 1908 to set at rest the conflict of opinion which existed as to the question whether when a decree was amended limitation ran from the date of the decree or from the date of the amendment. In some cases an amendment of the decree was regarded as a review of judgment and therefore time ran under clause 3 from the date of the amendment—*Kali Prasanna v Lal Mohan* 25 Cal 258 *Kishen Sahai v Collector*, 4 All 137 (141) *Venkata Jogayya v Venkata Simhadri* 24 Mad 25 *Vishvanathan v Ramanathan* 24 Mad 646. This view was however doubted in another Calcutta case *Rakkhal v Jogendra* 10 C L

decree or not—*Christanna Benshaw v Benarasi Prasad*, 19 C W N 287,
2 Ind Cas 685 *Pancho Bania v Anand Thakur*, 7 Pat 712 (714)

In some cases however the Judges are unwilling to draw a distinction between a joint and a several decree and they refuse to enter into such subtle points as to whether the decree is imperilled or not by the appeal of one defendant only. Thus in a Madras case it has been remarked that even though all the judgment-debtors do not appeal no question arises as to whether the decree is against the remaining judgment-debtors is imperilled by the appeal or not. The words of clause 2 of this Article are clear and should be followed by the Courts viz that whenever an appeal is preferred the period of limitation runs from the date of the final decree of the Appellate Court whether all the judgment-debtors or some only of them have appealed makes no difference. There is only one decree that can be executed and that is the final decree of the Appellate Court—*Viravaghava v Ponnammal* 23 Mad 60 67 (dissenting from *Muthu v Chalappa* 12 Mad 479). In a more recent case the same High Court observes that the question of limitation ought not to be made to depend upon the difficult and doubtful point whether an appeal by one of the defendants as or against a part of the decree of the first Court imperils the decree passed against the other defendants or the other portion of the decree. Such subtle distinctions not warranted by the language of the Legislature should not be introduced by the Courts—*An Chetty v Theerika malai* 3 L W 521 34 Ind Cas 791. In the Full Bench case of *Mashia Junissa v Rani* 13 All 1 the minority of the Judges (Mahmud and Broadhurst JJ) have expressed the view that the word decree in clause 2 of Article 182 should not be qualified by any such epithet as joint or several that the words of Article 182 are so clear and distinct that they scarcely admit of any such distinction being drawn and that the Article contains nothing as to whether the appeal shall have been made by all the parties or by one or how far the appellate Court's order may or may not affect the rights of parties who have not appealed. The same opinion has been expressed by Maclean C J in the Calcutta Full Bench case of *Gopal Chander v Gosain* 25 Cal 594 (599 602). This view was also taken in an earlier Allahabad case *Nurul Hasan v Muhammad Hasan* 8 All 573 (575 576). A recent case of the Patna High Court also seems to support this view *Somar Singh v Premder* 3 Pat 377 (at p 336) A I R 1925 Pat 40 and the Punjab Chief Court was also of the same opinion in *Anwar Ali v Inayat Ali* 32 P R 1907. In *Shivram v Sakharam* 33 Bom 39 (43) the Bombay High Court has held that the plain words of clause 2 of Article 182 should not be disregarded and therefore if there is an appeal by some of the defendants the period of limitation for execution against all the defendants including those who have not appealed runs from the date of the appellate decree. This case has been followed in another recent case where the period of limitation for execution against

the sureties of the defendants have been held to run from the date of the Appellate decree even though the sureties were not parties in the appeal—*Cholappa v Panichandra* 44 Bom 34 (40 42)

704 Withdrawal of appeal—The words or the withdrawal of appeal have been newly added to this clause to remove the conflict of decisions which existed under the Act of 1877 as to whether the withdrawal of an appeal did or did not give a fresh starting point for limitation. In the case of *Pamanuja v Lakshmi* 30 Alit 1 (1 B) it was held that the withdrawal of the appeal gave a fresh period whereas the contrary opinion was expressed in the cases of *Patelji v Gauri* 15 Bom 370 *Chudasama v Mohant Ismargar* 16 Bom 243 *Abdul v Moidin* 27 Bom 500 (11 p 506) *Bhagwan v Mohan Lal* 51 P R 1908 and *Kanara v Goud* 1 M L J 745. These 5 cases are now superseded.

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As in the case of appeal so in the case of review or amendment of decree it may be said that if only a part of the decree is sought to be reviewed or amended limitation is saved as regards the whole decree. The intention of the Legislature is to treat the decree as a whole although only a part may be the subject of an appeal or an application for review of judgment or amendment of decree. Limitation runs with respect to the execution of the whole decree only when the proceedings in appeal review or amendment come to an end—*Vydanatha v Subramania* 36 Mad 104 (106).

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J 457 Another Allahabad case went so far as to say that if a decree was amended so as to bring it into conformity with the judgment the decree could not be said to be executable at the time of its passing consequently clause 1 of Article 182 was not applicable and as there was no other clause of this Article applicable to the case Article 181 applied and time ran from the date of the amendment that being the date when the right to apply accrued under that Article—*Muhammad Suleman v Muhammad Yar* 17 All 39

All this divergence of opinion is now set at rest by the specific provision contained in the present clause of this Article

The date of amendment means the date of the judgment ordering the amendment (on the analogous principle that a decree bears the date on which judgment is delivered) and not the date on which the decree is actually amended—*Nirvi v Kalananda* 36 Ind Cas 533 (Patna) *Venkataswami v Venkatasubba* 49 Mad 807 50 M L J 551

Where a decree was incapable of execution at the time when it was passed (in as much as it did not at all specify the relief granted or did not contain the names of the judgment-debtor and decreeholders) time runs from the date of amendment even though the amendment was made more than 3 years after the decree was passed—*Mohamaya v Abdul Hamid* 18 C W N 266 (268) *Senalan v Dinabandhu* 34 C L J 397 In other words a barred decree is revived by amendment and time for execution runs from the date of amendment provided that the decree was incapable of execution before the amendment If however the decree was capable of execution before the amendment (e.g. where the decree was passed against a dead person through a clerical error but the decreeholder knew who the legal representatives of the deceased were) an application for execution made more than three years after the date of decree is barred even though the amendment (stating the names of the legal representative) was made more than three years after the date of the decree—*Anandram v Nityananda* 32 Ind Cas 744 (Cal) *Rabiuddin v Ram Kanai* 59 Ind Cas 186 (Cal) In other words it is not every amendment that will revive a barred decree or give a fresh starting point of limitation it is only an amendment of a material part of the decree that will have that effect Where an amendment in an *ex parte* rent decree consisted merely in a correction of the rate of rent the amount of rent decreed remaining the same such amendment could not revive a barred decree and provide a fresh starting point for the amendment was made merely in an ancillary part of the decree Here it could not be said that the decree was incapable of execution before the amendment—*Raja Kalanand v Rajkumar* 2 P L J 286 (287) 39 Ind Cas 624

707 Clause 5 —Application —The defence by the decree holder of an appeal preferred by the judgment-debtor in an execution proceeding is not an application to take a step in aid of execution—*Baij Nath v*

Harī Charan 48 Ind Cas 187 (Pat) This clause requires that the decree holder should make a direct and independent application for execution of his decree on his own account a resistance by him to the execution of another man's decree cannot be a step in aid of execution of his own decree—*Shib Lal v Radha Kishen* 7 All 893

Where an order made in aid of execution is of such a nature that the Court could not have made it without an application by the decree holder it may be presumed that due application had been made for it—*Trimback v Kashinath* 22 Bom 722 *Mulchand v Jamanbī* 27 Bom L R 671 *Adimulthu v Adisappa* 12 Bur L T 113

It is necessary that the prior application must have been made by the decree holder where an application was made by the judgment debtor for postponement of the sale and the decree holder consented to the postponement held that there was no application by the decree holder and the consent of the decree holder to the postponement could not be treated as an application made by him so as to save the bar of limitation—*Sreenivasachariar v Ponnusamy* 28 Mad 40

The mere act of the Court confirming a sale in execution which act is not shown to have been performed at the instance of the decree holder upon petition is not an application to take some step in aid of execution—*Molendra v Mohendra* 10 C L R 330

This clause contemplates an application to take a step and not a suit A suit by a decree holder for a declaration that the property released from attachment on the claim of a third party is liable to be attached and an appeal to the High Court from the decision of the Lower Court are not steps in aid of execution—*Raghunandan v Bhugon* 17 Cal 268 But in *Laxmiram v Dhalashankar* 39 Bom 20 26 Ind Cas 262 it was held that an appeal by the decree holder against an order adjudging the judgment-debtor an insolvent was a step in aid of execution See also *Sheo Ram v Ram Bharoey* 26 O C 71 A I R 1923 Oudh 3 where the word application was held to be a comprehensive term so as to include a suit

The prosecution of an appeal from an order made in the course of a proceeding in execution of a decree cannot be looked upon as an application in accordance with law for execution or to take some step in aid of execution—*Nand Kishore v Sipahi Singh* 26 All 608 *Kristo Coomar v Mahabat Khan* 5 Cal 595 *Govinddas v Ganapaldas* 47 Bom 783 25 Bom L R 518 A I R 1923 Bom 431

708 Oral application—The application mentioned in this clause need not be in writing an oral application will satisfy its requirements—*Trimback v Kashinath* 22 Bom 722 *Mulchand v Jamanbī* 27 Bom L R 671 *Maniklal v Nasia* 20 Bom 179 *Abdul Kadir v Krishnama Iammal* 38 Mad 695 *Amar Singh v Tika* 3 All 139 *Surajmal v Sarjoog* 2 P L J 51 *Gulsari Lal v Ram Bhajan* 22 O C 76 *Narayan v Balkrishna*

(7 Ind C 810 (Nag) *Krishna Aiyar v Veetil* A I R 1922 Mad 30
 15 I W 14 *Adimuthu v Adiappa* 1 Bur L T 113 *Contra—Masilamani v Sethuswami* 41 Mad 251 (per Aylmer J at pp 253 254, dissenting from 38 Mal 695)

Thus an oral application to the Court to enter partial satisfaction of the decree is a step in aid of execution—*Adimuthu v Adiappa* 12 Bur L T 113 an oral application made to the Court to proceed with the sale is one in aid of execution and saves limitation—*Gulzar Lal v Ram Bhasan* 22 O C 76 an oral application for an adjournment of the hearing of a previous execution application in order to enable the decree holder to produce an encumbrance certificate in respect of the attached property is a step in aid of execution which would save limitation—*Abdul Kadir v Krishnamallamma* 38 Mad 695

The Madras High Court has recently laid down that where the C P Code requires a written application for execution a mere oral application would not be a step in aid of execution and where a written application is filed as required by the Code an oral application is a mere superfluity and such superfluous oral application cannot save limitation. In order that the oral application may be effective as a step in aid of execution the application must be one which it is necessary to make in order to get the main relief sought for in the execution petition. It must be of such a nature that if the application were not made further proceedings in execution could not be taken either by reason of the specific prayer not being contained in the execution application or by reason of the Code or the Rules of practice requiring further acts to be done before the main relief prayed for in the execution application could be granted or enforced—per Kumari Sastri J in *Masilamani v Sethuswami* 41 Mad 251 (255)

709 Date of applying.—The date of applying either for execution or to take some step in aid of execution is the date when the application is made and not when it is heard and an order passed thereon—*Sarathumari v Jagat Chandra* 1 C W N 760 *Thakur Ram v Halwaru* 22 All 358 *Raj Behary v Kalihar* 10 C L J 479 3 Ind Cas 336 *Trimbak v Kashi Nath* 2 Bom 72 *Troilokya v Jyoti Prakash* 30 Cal 761 (770) *Mochas v Meseruddin* 13 C L J 26 *Annapurna v Dharendra* 24 C W N 55 *Bhagwant v Zamir Ahmed* 3 Pat 596 nor the last day or any other day on which the application was pending—*Fakir v Gulam* 1 All 580 (F B)

710 Proper Court.—An application although it is a step in aid of execution will not save limitation unless it is presented to the proper Court—*Penugonda v Korasika* 31 M L J 90

In Explanation II 'proper Court' has been defined as a Court whose duty it is to execute the decree or order

When a decree is transferred from one Court to another, the proper Court within the meaning of this clause is the Court to which the decree

is transferred until it has made its return to the Court which made the decree and any application made to the Court which passed the decree would be insufficient to save limitation—*Man ra k v Ambika* 13 C W N 533 (540) *Abda Begam v Mirzaffir* 0 All 129 *Mahiraj of Bobbili v Narasaraaju* 39 Mad 640 P C (affirming 37 Mad 231) *Juvendra v Jogendra* 2 Pat 247 A I R 1923 Pat 384 *Syed Mohd Shahir v Jugal Ashore* 28 O C 169 When a decree is transferred from Court A to B then until the Court B has returned the decree to Court A any application for a further transfer of the decree to any other Court C must be made to the Court B, if made to Court A it will be insufficient to save limitation—*Pangasram v Sheshappa* 47 Bom 56 (61) 24 Bom L R 798

Where a decree has been transmitted from one Court to another the notice required to be issued under O 21 r 2, must be issued by the Court to which the decree has been transferred consequently an application for the issue of such notice if made to the Court which passed the decree is not an application in accordance with law as it is not made to the proper Court—*Haari Lal v Baidyanath* 56 C W N 2, A I R 1922 Cal 3

Where the area of the property over which the Court which passed the decree had local jurisdiction at the time of passing it is by reason of an alteration of the local jurisdiction of the Court removed to the jurisdiction of another Court at the time of presenting the application for execution the proper Court for applying for execution within the meaning of this clause is the Court which passed the decree—*Seeni Nandan v Muthuswami* 4, Mad 821 (I B) *Jagannath v Sekharam* 27 Bom L R 613 A I R 1925 Bom 414 The reason of this decision is that otherwise a decree holder when he decides to apply for execution possibly at the last moment will be bound to stop and enquire whether the limits of the territorial jurisdiction of the Court which passed the decree have been altered and if so whether the immoveable property which is the subject of the suit or the place where the cause of action arose is within the limits of the transferred area on pain of losing his right to execute under this Article if he omits to make these enquiries or comes to a wrong conclusion if he makes them This is so unreasonable and involves such hardships to the decree holder in a country like India with a stringent law of limitation that we should hesitate to impute such an intention to the Legislature—per Wallis C J in 42 Mad 821 (I B)

A contrary view was taken in two earlier cases of the Madras High Court—*Penugonda v Korasiku* 31 M L J 30 35 Ind Cas 237 and *Seshadri v Ananthayee* 1217 M W N 788 42 Ind Cas 671 These two cases are now practically overruled by the Full Bench case cited above

An application for execution made to the Court which passed the decree can be said to have been made to the proper Court even though the presid

the conclusion that the particular relief or reliefs shall not be granted, held that such an application would still be an application in accordance with law provided it meets in substance the requirements of the C P Code or any law relating to execution—*Bando v Narasimha*, 37 Bom 42, 17 Ind Cas 210 *Subramanian v Ramaswami*, 49 M L J 753, A I R. 1926 Mad 179

Where an application asks partly for a relief granted by the decree and partly for relief totally outside the decree, the application may be void as to the latter, but all the same it is good in law as to the former, and therefore in 'accordance with law'—*Bando v Narasimha*, (supra)

Where a decree directs that the decreeholder shall be entitled to a certain relief in a certain event or on a certain condition, and the decree holder applies for that relief before the happening of that event or before fulfilling that condition, it does not follow that he has applied for a relief which is outside the decree and that therefore the application is not one in accordance with law—*Bando v Narasimha* (supra); *Nathubhai v Pranjivan*, 34 Bom 189 Thus, where a decree ordering partition directs that the plaintiff shall not be entitled to execute (i.e. recover his share) until he has paid the amount of Court fee leviable on his claim, an application for execution unaccompanied with the Court fee is still an application in accordance with law—*Nathubhai v Pranjivan*, 34 Bom 189, 5 Ind Cas 601

If a person executes a decree with the permission of the Court—a permission which the Court is expressly authorised to give—it cannot be said that he is not doing so in accordance with law Thus, where a decree is transferred (really or nominally) and the ostensible transferee executes the decree with the permission of the Court (given after due notice to the judgment debtor and decreeholder), the proceedings taken and the application on which they are based are in accordance with law as between him and the judgment-debtor, although he is a *benamidar*, and the decree is kept alive—*Balkishen v Bedmali*, 20 Cal 388

An application for execution by some only of the decree-holder's legal representatives though not purporting to be on behalf of the other representatives, is sufficient to save limitation—*Varudevapatta v Narayana-pamgrahi*, 1916 M W N 112

An application for execution by the legal representative of a deceased decreeholder without bringing his name on the record is an application in accordance with law—*Alagirisami v Venkateshchellapathy* 31 Mad 77.

Where an application for execution of a decree made under sec 232 of the Civil Procedure Code (1882) was disallowed on the ground that the applicants had not shown, as they alleged, that they were the persons beneficially interested in a transfer of the decree taken *benami* in the name of a third person, and within three years from the date of such application a subsequent application was made by them, in which they were able to prove their allegation, it was held that the former appli-

cation had been a proper application and the latter was therefore within time—*Hidai v Chakkar* 5 C I R 253

Where an application for execution of a decree is made by a person who at the time of making it was on the face of the decree the only person entitled to execute it the application does not cease to be an application in accordance with law merely because it is afterwards decided that that person had no title to execute the decree—*Hari Krishnamurthi v Suryanaraynamurthi* 43 Mad 426

Where a transferee of the decreeholder instead of applying for execution as he ought to do in law makes an application asking for recognition as transferee, such application is still in accordance with law and is a step-in aid of execution—*Annamalai v Ramier* 31 Mad 234

A decree having been obtained against a minor represented in suit by his mother as guardian the decreeholder erroneously took out execution against the mother personally and not as the guardian of her son. The application was granted and a property belonging to the minor was attached. It was held under the circumstances that the application was one in accordance with law notwithstanding the technical defect therein—*Hari v Varajan*, 12 Bom 427

An application for execution of a decree against a minor represented by his mother without any application to the Court for an order appointing the mother as guardian *ad litem* is an application in accordance with law—*Kethava Surendra v Muluksami* 4 P L J 35

Where a decree granted simple interest and an application for execution was made in which the interest calculated was compound interest held that the mere mistake in calculating more interest than what was due did not prevent the application from being one in accordance with law. Although the relief claimed had been exaggerated by the extra amount of interest it would be competent to the Court to treat the extra interest as a surplusage and to strike it out and then grant relief—*Jamil unnessa v Mathura Prosad* 43 All 550

An application to execute a decree was made under a general power of attorney from A and B the decree holders on the 19th February 1878 but B had died on the 12th February and this fact was unknown to the holder who made the application. It was held that this application was one in accordance with law within the meaning of this clause—*Amir unnessa v Achanullah* 13 C. L. R 18

Where a decree is erroneously passed in favour of a firm in the name of an agent and applications for execution are put in by its other agents not named in the decree such applications are in accordance with law and sufficient to keep the decree alive—*Lachman v Patni* 1 All 510

A decree in a redemption suit directed the plaintiff to recover possession of the mortgaged property on payment of a certain amount but the decree did not fix the time within which the payment was to be made. The

application in accordance with law to take a step in aid of execution—*Janardan v Narayan* 42 Bom 420 (431)

711 In accordance with law —The words in accordance with law are adjectival not only to the words to the proper Court for execution but also to the words to take a step in aid of execution. Therefore it is necessary that the prior application which was a step in aid of execution was in accordance with the law of limitation : *e* was within time —*Bhagwan v Dhondi* 22 Bom 83 (85) *Nilmoney v Ram Jeebun* 8 C L R 335 If the prior application which was made in a Native State was time barred according to the law of limitation in British India (being made more than 3 years after the date of the decree) though it was not time barred according to the law of the Native State it is incapable of saving limitation and the execution of the decree is barred—*Nabibhai v Dayabhai* 40 Bom 504 (508)

Where the prior application for execution which was barred by time was admitted by the executing Court and execution was ordered to issue thereon the order though erroneously made was nevertheless valid unless reversed on appeal and the application was in accordance with law and a step-in aid of execution. The judgment-debtor cannot object to a subsequent application for execution on the ground that the previous application was barred by time the matter being *res judicata*—*Desaiappa v Dundappa* 44 Bom 227 *Gulappa v Erava* 46 Bom 269 (271) *Mungai Pershad v Griyakant* 8 Cal 51 (59) P C *Jago Mahlon v Ahirodhar* 2 Pat 759 *Lakshmanan v Kuttayyan* 24 Mad 669 *Prabhulingappa v Gurunath* 45 Bom 453 (459) But although the matter is *res judicata* between the parties it is open to a third party to dispute the correctness of the prior adjudication allowing a time barred application. So a judgment-debtor who was not a party to a previous application for execution of a decree or to any order made upon it is not precluded from showing that the said application was barred by limitation and that therefore it was not in accordance with law —*Harendralal v Sham Lal* 27 Cal 210 (213)

The expression applying in accordance with law means applying to the Court to do something in execution which by law that Court is competent to do. It does not mean applying to the Court to do something which either to the decree holder's direct knowledge in fact or to his presumed knowledge of the law the Court was incompetent to do—*Purna Chandra v Radha Nath* 33 Cal 867 *Chatter v Newal* 12 All 64, *Stevens v Kaista* 10 C L J 19 *Munawar v Jani* 27 All 619 *Khet Singh v Onkar Seth* 1 N L R 61. Therefore an application to have the judgment debtor arrested in contravention of the terms of sec 341 Civil Procedure Code (1882) and an application to bring the mortgaged property to sale in contravention of sec 99 of the Transfer of Property Act are not appli-

cations in accordance with law within the meaning of this clause—*Chatter v. Neral* 12 All 64

An application to transfer a decree to a Court which is peculiarly incompetent to execute the decree is not an application in accordance with law.—*Ameritulla v. Muslihdar* 1 Pat 651 (653) 3 P 1 T 422, 67 Ind. Cas. 538. Similarly, an application for execution of a decree by attachment of property beyond the local jurisdiction of the executing Court is not one in accordance with law—*Skeo Prasad v. Narain*, 45 All 468, A I R 1926 All. 95

Where a decree directs that the plaintiff should be maintained in possession of a share of a village by cancellation of the order of the settlement officer directing the entry of the defendant's name in respect of such share in the revenue registers, the Court executing the decree should not issue an order to the Collector to amend the entry in such register, but must simply forward a copy of the decree for his information. Therefore, an application for execution, which prays the Court executing the decree to order the Collector to amend such entry in the revenue record, instead of asking it to send such officer a copy of the decree for his information for the purpose of amendment, is not an application in accordance with law—*Muhammad Umar v. Kamla Bibi*, 4 All 31.

The application for execution contemplated in this clause must be one made in accordance with law and asking to obtain some relief given by the decree and to obtain it in the mode that the law permits. If the application asked for a relief which the decree did not give, it was not an application for execution, nor a step in aid of execution within the meaning of this clause—*Pandarinath v. Lalachand*, 13 Bom 237; *Bando v. Narasimha*, 37 Bom 42; *Nathubhai v. Pranjanan*, 34 Bom 189; *Sri Ram v. Majiduddin*, 98 P. R. 1901. Thus, where an instalment decree did not provide that in default of payment of an instalment the whole amount would become due, but on the judgment-debtor making default the decree holder applied for execution of the whole decree, *held* that the application, not being in accordance with the terms of the decree, was not one in accordance with

law. *See also*, *supra*, and that the application was not in accordance with law nor one to take a step in aid of execution as it asked for a relief outside the decree altogether—*Pandarinath v. Lalachand* 13 Bom 237. Where the decree directed payment of a money out of the mortgaged property, an application to recover the money from the other properties of the judgment debtor was not an application in accordance with law—*Sri Ram v. Majiduddin*, 98 P. R. 1901

But where a decree gives certain relief, and the application for execution seeks some or all of them, and the Court after going into the merits of the application and considering all the circumstances of the case, comes to

the conclusion that the particular relief or reliefs shall not be granted, held that such an application would still be an application in accordance with law provided it meets in substance the requirements of the C P Code or any law relating to execution—*Bando v Narasinha*, 37 Bom 42, 17 Ind Cas 210 *Subramanian v Ramaswami*, 49 M L J 753, A I R. 1926 Mad 179

Where an application asks partly for a relief granted by the decree and partly for relief totally outside the decree, the application may be void as to the latter, but all the same it is good in law as to the former, and therefore in 'accordance with law'—*Bando v Narasinha* (supra)

Where a decree directs that the decreeholder shall be entitled to a certain relief in a certain event or on a certain condition, and the decree holder applies for that relief before the happening of that event or before fulfilling that condition, it does not follow that he has applied for a relief which is outside the decree and that therefore the application is not one in accordance with law—*Bando v Narasinha*, (supra), *Nathubhai v Pranjivan*, 34 Bom 189 Thus, where a decree ordering partition directs that the plaintiff shall not be entitled to execute (i.e. recover his share) until he has paid the amount of Court fee leviable on his claim, an application for execution unaccompanied with the Court fee is still an application in accordance with law—*Nathubhai v Pranjivan*, 34 Bom 189 5 Ind Cas 601

If a person executes a decree with the permission of the Court—a permission which the Court is expressly authorised to give—it cannot be said that he is not doing so in accordance with law Thus, where a decree is transferred (really or nominally), and the ostensible transferee executes the decree with the permission of the Court (given after due notice to the judgment debtor and decreeholder), the proceedings taken and the application on which they are based are in accordance with law as between him and the judgment-debtor, although he is a *benamidar*, and the decree is kept alive—*Balishen v Bedmati*, 20 Cal 388

An application for execution by some only of the decree holder's legal representatives, though not purporting to be on behalf of the other representatives, is sufficient to save limitation—*Vasudevapalla v Narayana-pamgrahi*, 1916 M W N 112

An application for execution by the legal representative of a deceased decreeholder without bringing his name on the record is an application in accordance with law—*Alagirisami v Venkatachellapathy*, 31 Mad 77.

Where an application for execution of a decree made under sec 232 of the Civil Procedure Code (1882) was disallowed on the ground that the applicants had not shown, as they alleged, that they were the persons beneficially interested in a transfer of the decree taken *benami* in the name of a third person, and within three years from the date of such application a subsequent application was made by them, in which they were able to prove their allegation, it was held that the former appli-

attorney had been properly appointed and the latter was therefore within time—*Poddai v. Ankanna* 50 I. R. 51

Where an application for execution of a decree is made by a person who at the time of making it was not the holder of the decree the only person entitled to execute it at the application of the applicant is the applicant in person in accordance with law merely because it is afterwards decided that that person had no title to execute it—*Haris Krishnamurthy v. Suryaratnamurthy* 43 Mad. 44

Where a transferee of the decreed debt in text of applying for execution as he ought to do in law makes an application asking for recognition as transferee such application is still in accordance with law and is a step-in aid of execution—*Annamalai v. Ramier* 31 Mad. 234

A decree having been obtained against a minor represented in suit by his mother as guardian the decreeholder erroneously took out execution against the mother personally and not as the guardian of her son. The application was granted and a property belonging to the minor was attached. It was held under the circumstances that the application was one in accordance with law notwithstanding the technical defect therein—*Haris Narayan* 12 Bom. 427

An application for execution of a decree against a minor represented by his mother, without any application to the Court for an order appointing the mother as guardian *ad idem* is an application in accordance with law—*Keshava Surendra v. Mulukant* 4 P. L. J. 35

Where a decree granted simple interest and an application for execution was made in which the interest calculated was compound interest held that the mere mistake in calculating more interest than what was due did not prevent the application from being one in accordance with law. Although the relief claimed had been exaggerated by the extra amount of interest, it would be competent to the Court to treat the extra interest as a surplussage and to strike it out and then grant relief—*Jamil unnessa v. Mashura Prosad* 43 All. 550

An application to execute a decree was made under a general power of attorney from A and B the decree holders on the 19th February 1878 but B had died on the 12th February and this fact was unknown to the pleader who made the application. It was held that this application was one in accordance with law within the meaning of this clause—*Amir unnessa v. Ashanullah* 13 C. L. R. 18

Where a decree is erroneously passed in favour of a firm in the name of an agent, and applications for execution are put in by its other agents not named in the decree, such applications are in accordance with law and sufficient to keep the decree alive—*Lachman v. Palni* 1 All. 510

A decree in a redemption suit directed the plaintiff to recover possession of the mortgaged property on payment of a certain amount but the decree did not fix the time within which the payment was to be made. The

decreeholder applied for execution of the decree but the application was dismissed on the ground that he had not paid the decree-amount. In a subsequent application the question arose whether the prior application was in accordance with law. It was held that though the payment of the amount was a condition precedent to the making of an order for the delivery of the property, it was not a condition precedent to the making of an application for a conditional order, and the prior application for execution of the decree without paying the amount was an application in accordance with law—*Syed Hussain v Rajagopala*, 30 Mad 28.

An application for execution made against persons whose whereabouts are not known is an application in accordance with law—*Mahmud Hosain v Enayat*, 36 All 482.

An application for execution of a decree which was made while the decree was under attachment and was dismissed on that ground, is an application in accordance with law which would save limitation—*Gopala Menon v Munavikraman*, 10 M L J 568, *Adhar v Lalmohan*, 24 Cal 778.

An application which omits to mention an uncertified payment made out of Court is, notwithstanding such omission, an application in accordance with law—*Marimuthu v Ramaswami*, 10 L W 66.

An application for execution of a decree against a dead person (without his representative being brought on the record) under the influence of *bona fide* mistake though that application could not be acted upon, is nevertheless an application in accordance with law and is a step in aid of execution—*Bispi v Bibi Zohra*, 35 Cal 1047. See also *Samia v Chokkalingi*, 17 Mad 76 (Contra—*Madho Prasad v Kesho Prasad*, 19 All 337). So also, an application for execution in which owing to a *bona fide* mistake the minor judgment-debtor was described under the guardianship of a dead person, is a step in aid of execution—*Puran Mal v Dilwa*, 4 P L T. 54, 72 Ind Cas 1003. An application for execution against a wrong person is one in accordance with law, where the decree itself is wrongly passed against that person—*Debi Bahsh v Shambhu Dayal*, 48 All 281, 24 A. L. J 266, A I R 1926 All 384.

712. *Irregular or defective application*—An application must be in substantial compliance with the law in order that it may be regarded as one coming within the meaning of this clause, but it is not every defect that would invalidate an application and take it out of this clause, it is only *material* defects that can vitiate an application. An application containing defects of a *minor* character (e.g. mistake in the right number of suit and date of decree) is one according to law within the meaning of this clause—*Gopal Chunder v. Gosain Das*, 25 Cal 591 (F. B.); *Keshwa Surendra v. Debendra*, 4 P L J 213, *Abdul Rafi v. Maula Bahsh*, 37 All. 527 (528).

An application for execution which does not comply in every particular

is substantially in accordance with law—*Bando v Narsinha*, 37 Bom 42 17 Ind Cas 210

An insufficiently stamped application for execution may suffice to keep the decree alive—*Ramasami v Seshayyengar*, 6 Mad. 181.

An application which is unverified and is defective in the statement of minor particulars which may be easily gathered from the decree filed there with may be regarded as one substantially in accordance with law, if the defects are not calculated to mislead the Court or prejudice the judgment debtor—*Ramayyan v Kadir Bacha* 31 Mad 68 (70)

Where the only defect in an application for execution was that the date of a previous application (which date was not material) had been wrongly stated therein but even such trivial defect was amended with a delay of only two days beyond the time allowed by the Court, such application was held to be one substantially in accordance with law so as to give a fresh starting point—*Kalka v Bisheshar*, 23 Ayl 162

Any incorrectness or superfluous as to the relief asked for in the application does not vitiate the application to such an extent as to debar the application from being treated as a step in aid of execution—*Kishore Mal v Jagdish Narain* 3 Pat 42, A I R 1924 Pat 471

If the Court applied to for execution is not the Court which passed the decree, the name of the latter Court need not find a place in the application for execution. The omission to mention the name of such Court does not render the application one not in accordance with law—*Vishal v Gopal Rao*, 5 N L R 8

An application for execution of a decree, though not accompanied with a copy of the decree, as required by the Rules of the High Court is an application in accordance with law, because the defect has reference only to extraneous circumstances—*Ramchandra v Laxman*, 31 Bom 163, *Pachappa v Poojari*, 28 Mad, 557.

An application for execution of a decree made by the legal representative of a deceased decree holder, without the production of a certificate under the Succession Certificate Act is nevertheless one made 'in accordance with law'—*Balkrishna v Wagarsing* 20 Bom 76, *Mangal v Salimullah*, 16 All 26, *Hafizuddin v Abdool*, 20 Cal 755 It is sufficient if the certificate is produced and tendered in Court at any time before the Court proceeds to pass an order for execution—*Kahan v Ram Charan*, 18 All 34

An application for execution would be in accordance with law even though unaccompanied with the Conciliator's certificate as required by Sec 47 of the Dekhan Agriculturist's Relief Act—*Sadasiv v Narsingrao*, 17 Bom L R 203 So also, an application for execution of a decree passed against a Taluqdar, although unaccompanied with a certificate of execution for executioner sec 29E of the Gujrat Taluqdar's Act, 1888,

is an application in accordance with law—*Hargovind v Naja Sura* 43 Bom 44

Where after a decree was transferred for execution to another Court the interest of the decree holder became vested by operation of law in another person and the latter applied for execution to the Court to which the decree was transferred without previously obtaining from the Court which passed the decree a certificate authorising him to proceed with the execution but subsequently produced such certificate it was held that the certificate would relate back to the time when the rights under the decree became vested in the applicant and the application was made to the proper Court in accordance with law—*Manorath v Ambika* 13 C W N 533 (537) 1 Ind Cas 57

An application for execution by the assignee of a decree is in accordance with law even though he fails to produce the assignment deed—*Lingajit v Ananda* 34 Bom 68 or though he produces an unregistered assignment deed—*Abdul Majid v Muhammad Faisulla* 13 All 89

An application for execution of a decree made by one member of a firm which has obtained a decree, is no doubt defective but it is still an application in accordance with law being provided for by O 21 rule 15 (1) of the C P Code and the mere fact that the Court does not allow the application under rule 15 (2) but dismisses it as defective does not make it any the less an application in accordance with law—*Gobardhan v Satish Chandra*, 1 Pat 609 (611) 4 P L T 263 69 Ind Cas 668

An application even though it may be so defective as not to be an application for execution may still be regarded as an application to take a step in aid of execution—*Sadaya v Paresb Nath* 35 C L J 82 A I R, 1922 Cal 44

713 Application not in accordance with law—Where an application for execution is forbidden by any special enactment it is not an application according to law—*Chaitin Kushalchand v Mohadu Bhagay* 10 Bom 91

An application for execution which omits to mention a previous application for execution as required by O 21 r 11 (f) is materially defective, and is not an application in accordance with law—*Sahigrai v Tower* 15 S L R 156 A I R 1922 Sind 29

An application made by a benamidar for execution of a decree and for substitution of his name as decree holder is not an application made in accordance with law within the terms of this Article—*Gour Sundar v Hem Chunder*, 16 Cal 355, *Denonath v Lalit* 9 Cal 633

An application made by the pleader of the decree holder after the decree holder's death has not the effect of saving limitation as the authority of the pleader ceases on the death of his client—*Kallu v Muhammad Abdul*, 7 All 564

Applications for the execution of a decree made after the death of the

judgment-debtor and without either any representative of the judgment-debtor being brought upon the record or without there being any subsisting attachment of the property against which execution is sought are not good applications for the purpose of saving limitation—*Madho Prasad v Keslo Prasad* 19 All 337 *Contra* —*Bepin Behari v Bibi Zohra* 35 Cal 1047

An application for execution against persons who are not the legal representatives of the deceased judgment-debtor is not in accordance with law—*Jnanendra v Ram Nehalo* 7 A L J 517

An application for partial execution of a decree is not in accordance with law. But a judgment-debtor who did not appeal against a previous order for execution of a portion of the decree and who did not dispute the validity of such order cannot in the matter of a subsequent application for execution of the remaining portion of the decree contend that the first application was not in accordance with law—*Dals Chand v Bai Shukor* 15 Bom 242 *Babagouda v Tanibai* A I R 1924 Bom 117 *Nanda v Raghunandan*, 7 All 282 *Nepal Chandra v Anurita Lal* 26 Cal 888

If the decree holder himself resides within the local limits of the jurisdiction of the Court an application by a person holding a general power of attorney from the decree holder is not in accordance with law with reference to secs 36 and 37 of the C P Code (1882)—*Murari v Umrao* 23 All 499 *Hasimiri v Beni* 26 All 19

An application for execution made by a guardian of the decree holder who is described as a minor but is found to be a major at the time is not in accordance with law—*Saramma v Seslayya* 28 Mad 396

Where the judgment-debtor has applied for insolvency and the insolvency proceedings are pending no application for execution can be made against the judgment-debtor's surety if such an application is made it will not be in accordance with law—*Langhi v Baijnath* 28 All 387

714 Step in aid of execution.—Clause 5 of Art 182 contemplates an application in accordance with law to the proper Court asking the Court to do one of two things either to execute or to take some step in aid of execution—*Murgeppa v Basawantrao* 37 Bom 559

This term is understood to mean a step taken by the Court towards executing the decree—*Raghunandan v Kally* 23 Cal 690 *Tarak v Gyanada* 23 Cal 817 and to take some step in aid means to obtain an order of the Court in furtherance of the decree—*Troilohya v Jyoti* 30 Cal 761, *Umesh v Soonder* 16 Cal 747

After having set the Court in motion to execute a decree, any further application during the continuance of the same proceeding is an application asking the Court to take some step in aid of execution—*Chowdhury Porooosh v Kali Puddo* 17 Cal 53 *Sujan v Hira* 12 All 399 (F B)

The words 'for execution' and 'step in aid of execution' mean that the decreeholder must really be desiring execution—that is there must be a bona fide intention on the part of the decreeholder to proceed with his right to have execution. A colourable application—made with the sole object of extending the period of limitation is not a step in aid of execution. The legislature did not contemplate an indefinite period being added to the life of a decree by permitting a decreeholder to take colourable steps in a very thinly disguised pretence of a desire to obtain execution when he really did not want execution at all but only wanted to secure a further period of limitation during which the amount of his decree might go on increasing—*Sheo Prasad v Naraini* 48 All 468 A I R 1926 All 95 24 A L J 137

An application in order to be a step-in aid of execution must be made in the course of a pending execution proceeding. The words 'step in aid of execution' appear to be intended to cover an application which is not an initial application for execution but is an application to take some step to advance an execution proceeding which is already pending. If the prior application was made at a time when no execution proceeding had been initiated the application was not a step in aid of execution—*Kuppuswami v Rajagopala* 45 Mad 466 (471) (dissenting from *Sankara v Thanganna* 45 Mad 702 705 where Ramesam J held that the application to be a step need not be made in a pending execution) *Dalagnruswami v Guruswami* 48 M L J 306 A I R 1925 Mad 703

The step must be taken to aid *ie* to advance the execution proceeding. That is the application contemplated by this clause is one to obtain some order of the Court in furtherance of the execution of the decree. The mere appearance of the decree holder or his pleader to oppose the proceedings taken by the judgment-debtor to set aside the execution sale cannot properly be regarded as an application to take some step in aid of execution because the execution of the decree is not further advanced than it was before the appearance of the pleader—*Umesh Chunder v Soonder Narain* 16 Cal 747. So also where a judgment debtor filed a petition for entering satisfaction of the decree which he claimed to have discharged and the decree holder filed a counter statement denying receipt of the decretal amount and asking that the petition should be dismissed such counter-statement did not amount to a step in aid of execution—*Kuppuswami v Rajagopala* 45 Mad 466 (470) 42 M L J 303 A I R 1922 Mad 79

In order to be a step in aid of execution it is not necessary that the prior application for execution must have been a successful one. Therefore where an application for execution was duly made in accordance with the terms of this clause the mere fact that the application was dismissed does not prevent it from furnishing a fresh starting point of limitation—*Adhar Chandra v Lal Mohan* 24 Cal 778 *Narsingh v Kalicharan* 14 C W N

486 *Shankar v Narsingrao* 11 Bom 467 *Gulappa v Erava* 46 Bom 269 Thus an application under O XXI rule 27 of the C P Code for execution of a decree with a prayer for substitution of the legal representatives of the deceased judgment debtor is a step in aid of execution though it was eventually dismissed for non payment of process fees—*Aptabuddin v Jogendra* 31 C L J 389

As to an application which is *withdrawn* by the decree holder on account of some formal defects in it it was once held that such an application could not afford a new starting point for limitation—*Saryu Prasad v Sita Ram* 10 All 71 *Kisayat Ali v Ram Singh* 7 All 359, *Radha Charan v Man Singh* 12 All 39, *Pirjade v Pirjade* 6 Bom 681 These cases were decided by applying the principle of sec 374 C P Code (now O 23 rule 2) to execution proceedings That section laid down that if a suit was withdrawn and a fresh suit instituted the plaintiff would be bound by the law of limitation in the same manner as if the first suit had not been instituted On the analogy of this rule it was held in the above cases that the question of limitation with reference to a subsequent application for execution of a decree must be determined on the supposition that the previous application (which had been withdrawn) had not been made But the authority of the above two cases has been shaken by the Privy Council decision in *Thakur Prasad v Fakrullah* 17 All 106 (P C) and by the enactment of sec 375A C P Code 1882 (O 23 rule 4 of the present Code) which expressly lays down that the provisions relating to the withdrawal of suits shall not apply to execution proceedings From this it follows that a prior application for execution which is withdrawn by the decreeholder will no longer be considered as non existent but will help to keep the decree alive and will act as a step in aid of execution with respect to a subsequent application See *Muzaraf v Amir* 15 C W N 71

But an application to *withdraw* a prior execution application with liberty to make a fresh application in a future time for execution of the decree does not amount to a step in aid of execution It is simply an application for further time to proceed with the pending execution proceeding and the mere granting of further time to make a subsequent application cannot be said to be a step as the taking of it does not assist the Court in executing the decree or advance the execution proceeding in any way—*Tarak Chunder v Gyanada Sundari* 23 Cal 817 (dissenting from *Ram Narain v Bukhtis Huar* 16 All 75)

The step in aid of execution has to be taken not by the applicant but by the Court An application by the legal representative of a deceased decreeholder for a succession certificate is a mere preparation or preliminary to the execution of a decree and is not an application asking the Court to take some step in aid of execution—*Murgeppa v Basawantrao* 37 Bom 559

But the step has to be taken by the Court at the instance of the decree

holder The mere act of the Court confirming a sale in execution which act is not shown to have been performed upon any application of the decree holder is not a step—*Motendra v Mohendra* 10 C L R 330

Again there must be an *application to the Court* to take some step in aid of execution the mere act of the decreeholder's taking a step in aid will not keep the decree alive For instance the mere payment by the decreeholder of Nazir's fee for the issue of sale proclamation unless accompanied with an application will not extend the time—*Madan v Ganga* 17 C L J 422 13 Ind Cas 189 (dissenting from *Radha Prasad v Surdar Lal* 9 Cal 644 646) and the mere fact that the payment was made pursuant to an order of the Court on a previous application is not sufficient—*Ibid*

In deciding whether any particular act is or is not an application for or a step-in aid of execution it is the nature of the act that must be looked to and not the time at which it may be possible to do it—*Koormayya v Arishnamma* 17 Mad 163

Limitation runs not from the date of taking a step in aid of execution but from the date of applying to take some step in aid of execution because it is not what the decreeholder does that is to be a step-in aid of execution, but what he asks the Court to do—*Thakur Ram v Katwaris* 22 All 358, *Lachman v Gahreshwar* 18 N L R 62 A I R 1922 Nag 166 nor does it run from the date when the application is disposed of and order passed thereon—*Mochas Mundal v Meseruddin Mollah* 13 C L J 26 *Troglakya v Jyoti* 30 Cal 76 *Trimback v Hashinath* 22 Bom 722 *Raj Behari v Kalihar* 10 C L J 479 *Bhagwanta Kuer v Dewan Zamir* 3 Pat 596

715 Step what is —An application by a judgment creditor to bring an execution case on the file and to record his certificate of the payment of a sum of money by the judgment-debtor is a step in aid of execution—*Tarimidas v Bistoolal* 12 Cal 608

An application by the decree holder praying that the judgment-debtor's property be sold subject to a mortgage of a claimant mortgagee was held to be a step in aid of execution—*Lalraddi Mullick v Kala Chaud Bera* 15 Cal 363

Where the original decree holder being dead his son applied to be brought on the record and to have money levied and paid such an application was a step in aid of execution—*Govind v Appaya* 5 Bom 246 *Keshavlal v Pitambardas* 19 Bom 261 so also is an application to the Court to issue notice under sec 248 to the heir of the deceased judgment debtor and to require him to adjust the account—*Ibid* *Gopal v Gosain* 25 Cal 594 (F B)

An application by a decree holder to execute a decree belonging to his judgment debtor and attached in execution of his own decree is a step in aid of execution of the latter decree and has the effect of keeping

it alive—*Lachman v Thondai Ram* 7 All 382 *Adhar v Lal Mohan* 24 Cal 778 *Gya Loan Office v Dhirit* 8 Ind Cas 675

An application made by a judgment-debtor stating that he had come to an adjustment of the decree with the decree holder and praying that the execution case might be struck off has been held to be a step in aid of execution—*Ghansham v Mukha* 3 All 320.

An application by a judgment creditor to the Court which passed the decree for a certificate that a copy of a Revenue Register of the land is necessary as a preliminary to the execution of the decree by attaching the land is a step in aid of execution—*Kunhi v Sheshagiri* 5 Mad 141

Where the decreeholder made an application to the executing Court that the original records of the case should be sent for as they were necessary in order to get rid of the objections raised by the judgment-debtor and the executing Court sent for the record held that the application was a step in aid of execution—*Raghunath v Lachhmi Narain* 47 All 667 23 A L J 422 A I R 1925 All 394

An application by a decree holder to the Court to which a decree has been transferred for execution to return the decree (which has been partially executed) to the Court which passed it for further execution is a step in aid of execution—*Krishnayyar v Venkayyar* 6 Mad 81 But an application by a decree holder to the Court to which the decree had been transferred to give the partially executed decree to him is not a step in aid of execution—*Aghore Kali v Prosonno* 22 Cal 817

An application for execution of a mortgage-decree for sale wrongly returned for want of a certificate under section 238 of the Civil Procedure Code although not represented is a step in aid of execution—*Mootha v Kandam Sankunni* 27 Ind Cas 811

A prior application will be regarded as a step in aid of execution so as to save limitation in respect of a subsequent application even though the properties sought to be attached in the subsequent application are different from those attached in the prior application—*Keshwa Surendra v Debendra* 4 P L J 213

Where a decree directs that the decretal debt shall be paid in instalments an application for recovery of one of the instalments due is a step in aid of execution with regard to all the instalments then due Thus an application was made in 1915 to recover the instalments due for 1911, 1912 and 1913 another application was made in 1918 to recover the same instalments and they were afterwards recovered In 1919 an application

tion for recovery of the instalments of 1911, 1912 and 1913 must be considered as a step-in aid so as to start a new period of limitation with regard to all the instalments then due—*Sitabai v Keshavnrao* 246 Bom 719

Consent —The judgment-debtor having applied to the Court to postpone the sale of some of the attached lands until others had first been sold, the vakil for the decree holder consented in part to this application, but insisted that certain other lands should also be sold in the first instance. It was held that this act of the vakil was a sufficient application to the Court to take some step in aid of execution—*Dharanamma v Subba*, 7 Mad. 306. The judgment-debtor applied for two months' time on the day fixed for the sale of his property, and the decree holder assented to postponement for that length of time only. The application was granted, and the Court thereupon struck the case off the file. This application was held to be in aid of execution—*Rajlukhy v Rask Munjary*, 5 C L R 315.

Application for partial execution —An application for partial execution of a decree though not in accordance with law, is a step in aid of execution especially when the judgment-debtor did not object to it—*Dali Chand v Bai Shikhor*, 15 Bom 242, *Nepal Chandra v Amrita*, 26 Cal 838.

For recognition —An application by a transferee from the decree holder asking for recognition as transferee, is a step in aid of execution—*Aruna malas v Ramier* 31 Mad 234, *Rajasingrispathy v Bhawani*, 47 Mad 642, 47 M L J 4, so also, an application by the legal representative of a deceased decree holder, for recognition as the decree holder—*Appaniamgar v Dharani*, 17 M L J 475.

For substitution —An application made by the transferee of a decree asking for substitution of his name in place of the name of the original decree holder is a step in aid of execution—*Pitani Singh v Tata* 9 All 301, *Bhagwantha Kuer v Dewan Zamir*, 3 Pat 596, and an application asking for time to find out the address of the judgment-debtor and to serve notice on him of the substitution application is also a step in aid of execution—*Ibid*. An application by the judgment creditor for substitution of the heirs of the deceased judgment debtor is a step in aid of execution—*Adhar v Lalmohun* 24 Cal 778, *Saday Chandra v Paresh Nath* 35 C L J 82, even though it contains errors in the matter of proper reliefs and is therefore not strictly in accordance with law—*Varadati v Kumara Venkata*, 26 M L J 83.

An application by the transferee of a decree to bring in the legal representatives of a deceased defendant is a step in aid of execution, though the applicant himself has not been recognised as the transferee of the decree holder—*Mahalinga v Kuppanachartar*, 30 Mad 541.

For payment —An application by the judgment creditor for payment of a fund or money attached is a step in aid of execution, if the money or the fund of which payment is sought has not been already realised in execution as the result of the attachment—*Apurba v Chundermoney*, 10 C W N 354. But if the money has been realised and is lying in Court, an application for the payment of the money is an application for merely

a ministerial order and does not amount to a step in aid of execution. See *Fazal Imam v Mulla Singh* 10 Cal 549 *Hem Chunder v Brojo Soon-dery* 8 Cal 89 and other cases (as well as contrary rulings) cited in Note 116 (subheading To take out money) at p 717 *infra*

For payment towards decree out of money deposited—Where money is deposited in Court as security for the costs of the suit, an order of the Court is necessary to make it available for payment towards the decretal amount and an application for such order is a step in aid of execution—*Thangai v Durga Sheethi* 35 M L J 575

For rateable distribution—An application for rateable distribution is one to take a step in aid of execution, where such an application was made and distribution was granted without fixing the amounts, and another application was made for an order to be paid the money so ordered to be distributed it was held that the second application was also a step in aid of execution—*Bajjnath v Ghanashyam*, 8 C W N 382 But if the order granting the application for rateable distribution also stated the precise amounts to be paid to the decree holders, an application for an order of withdrawal of the amounts was one for a mere ministerial order and was not a step in aid of execution—*Sadananda v Kalishankar*, 10 C W N 28

For issue of notice—An application by the decree holder under sec. 248 C P Code of 1882 (O 21, rule 22 of the Code of 1908) for the issue of a notice to the judgment-debtor, should be regarded as a step in aid of execution—*Kamachandra v Krishna Lal*, 1 Pat 328, *Jogendra v Mangal Prasad*, 7 P L T 330 A I R 1916 Pat 160, *Gobardhan v Satishchandra*, 1 Pat 609, *Pachiappa v Poojari*, 28 Mad 557, *Ramakshi v Ramaswami*, 18 M L J 14 *Govind v Appayya*, 5 Bom 246, *Gopal Chandra v Gosain*, 25 Cal 594, *Behari v Salih Ram*, 1 All 675, *Md Nawaz Khan v Ram Das*, 2 P R 1905, *Shankar v Zorawar*, 116 P R 1907, *Saday Chandra v Paresb*, 35 C L J 82, *Keshau Lal v Ptamber Das*, 19 Bom 261 But an affidavit of service of the notice does not amount to a step in aid of execution—*Mohan v Bapuji*, 11 Bom L R 729 But in a Calcutta case the filing of such an affidavit was held to be equivalent to a step in aid of execution—*Fran Krishna v Protap*, 21 C W N 423

A *batta* memorandum which mentions that *batta* is paid for the issue of notice to the judgment-debtor under section 248 C. P. Code (1882) is an application to take a step in aid of execution—*Alagamuthu v. Deva-sagaya*, 1916 M W N 780

Where a decree has been transmitted from one Court to another, the notice required under O 21, r 22 to be served on the judgment debtor must be issued by the Court to which the decree has been sent, in such a case an application made to the Court which passed the decree, for issue of the notice, is not a step in aid of execution—*Hazari Lal v. Baidya Nath*, 26 C. W. N 292, A I R 1922 Cal 3.

Filing affidavits of service of notice—The filing of an affidavit in proof of service of a process of attachment is a step in aid of execution—*Thakur v. Shro Bhanyan* 4 P L J 5-1

For time—An application asking for time to enable the applicant to adduce evidence of due service of notice under section 248 C P Code is a step in aid of execution—*Varasigh v. Kalicharan* 14 C W N 486 So also an application asking for extension of time for the purpose of ascertaining the whereabouts of the judgment-debtor—*Bhairan v. Amina* 38 All 692, or an application by the decree holder for time to enable him to ascertain the share of the judgment-debtor in the property put up for sale—*Lakshmanath v. Narsu* 23 Bom L R 107, or an application for time to obtain copies of extracts required by section 238 C P Code—*Seshadasa Charja v. Bhima Charja* 37 Bom 317 or an application asking for time to enable the applicant to obtain copies of decree and judgment made after presenting a dakhast to execute a decree—*Harissas v. Vithaldas* 36 Bom 638 so also an application by the mortgagor, who has obtained a redemption-decree for an extension of time for depositing the redemption money in Court—*Sankara v. Thangamm* 45 Mad 202

For attachment—An application asking for attachment of the properties of the judgment-debtor is a step in aid of execution. Consequently, a batta application which states that batta is paid to attach the properties of the judgment-debtor is a step in aid—*Govindaswami v. Govinda* 48 M L J 678 A I R 1225 Mad 880

To issue sale proclamation—To deposit process fee—An application to a Court to issue a sale proclamation is a step in aid of execution—*Imbica Pershad Singh v. Sardhari Lal* 10 Cal 851 (F B) *Choudhry Paroosh Rani Das v. Kali Paddo Banerjee*, 17 Cal 53 *Manoh Lal v. Vasia* 15 Bom 405 *Rajkishore v. Gurcharan* 9 Ind Cas 634 *Thiragaragavalu v. Srinivasulu* 28 Mad 327 But the mere payment of stamps or process fee unless accompanied by an application to issue the sale proclamation will not keep the decree alive—*Ilaiya v. Jagannatha* 7 Mad 307, *Thakur Kam v. Katwaru* 22 All 358, *Sheo Prasad v. Indar* 30 All 179 (180) *Malukchand v. Bechar Natha* 25 Bom 639 (F B) *Trimbak v. Kashinath* 22 Bom 722, *Foree Mokoriad v. Md Mabood* 9 Cal 730 (731) *Arunachalam v. Latchumanan* 47 M L J 537, A I R 1224 Mad 906, *Bhawani v. Syid Istikhhar* 7 Ind Cas 759 *Modan Mohan v. Ganga Charan* 17 C L J 422 13 Ind Cas 183 (dissenting from *Radha Prasad v. Sundar Lal* 9 Cal 644 646) So also the deposit of additional Court fee for service of a notice under sec 248 of the Civil Procedure Code is not a step in aid of execution when the deposit was made *after* the application to the Court and the step taken by it and where it did not appear that any application for execution or to take a step in aid was made at the time when the additional Court fee was paid—*Dwarkanath v. Anandrao* 20 Bom 179 In *Narendra v. Bhupendra* 23 Cal 374 (387) and *Bhupendra v. Rajen*

the payment and not the *payment* itself that can be considered as a step in aid of execution consequently if a decree is made in 1915, and a payment is made in January 1918 (within 3 years from the date of the decree) but an application for execution (together with an application for certifying the payment) is made in January 1920 the execution is barred—*Narayana v Kunhi Raman* 20 L W 190 82 Ind Cas 713 A I R 1925 Mad 131

So also an application made by the judgment debtor and signed by the decree holder to have certain payments which were made out of Court, certified and praying that time be allowed to pay the balance of the decree, the attachment in the meantime continuing is a step in aid of execution—*Hasi Imam v Poonit Singh* 20 Cal 696

Application to proceed with the case—On an objection being put in by the judgment debtor to the execution the Court ordered the parties to produce evidence in support of their respective cases, and in the course of those objection proceedings the decree holder filed a list of witnesses and intimated to the Court that he was ready to proceed with the case. It was held that this should be taken to be an application to the Court to take some step in aid of execution—*Brojendra v. Dil Mahomed*, 22 C W N 1027

To have objections dismissed—An application to the Court executing a decree asking that certain objections to the execution of the decree be dismissed is a step in aid—*Tamijunnissa v Najju*, 16 A L J 704

For arrest of surety—An application asking the Court to execute the entire decree by the arrest of the surety who has made himself liable for satisfaction of the decree is an application to take a step in aid of execution of the decree as against the original judgment-debtor—*Mahomed Hafiz v Mahomed Ibrahim* 43 All 152

For arrest of judgment debtor—An application for execution of a decree by arrest of the judgment-debtor will operate to save limitation in respect of a subsequent application in which the prayer was first for the arrest of the judgment-debtor and secondly for the arrest of two persons who had become sureties for the due satisfaction of the decree by the judgment-debtor—*Badruddin v Muhammad Hafiz*, 44 All 743

For final decree for sale—An application by the holder of a preliminary decree in a mortgage suit, for a final decree for sale, is a step in aid of execution—*Gulappa v. Crava*, 46 Bom 269, A I R 1922 Bom 118

Compromise—A compromise to have the rest of the decree executed on a future date is an application for taking a step in aid of execution—*Bindeswari v Awadh Behari*, 6 Ind Cas 366

Application for adjournment—An application for adjournment of the hearing of an execution application to enable the decree holder to produce an encumbrance certificate in respect of the attached property is a step in aid of execution—*Abdul Kadir v. Krishna Malammal*, 38 Mad. 69, *Munisami v. Muthia*, 33 Ind Cas. 79 (Mad.).

Application for substituted service—An application for substituted service is a step in aid of execution—*Aminu v. Danirasi* 36 All 439

For continuance of sale—An application by the decree holder for continuance of the sale in order to secure the attendance of more bidders is a step in aid of execution—*Direddy Yellamandir v. Sitakolli Chinnai* 16 M. L. T. 103

For re-arrest of judgment-debtor—Where an arrested judgment-debtor was released from jail on his application to be declared an insolvent an application by the decree holder for re-arrest of the judgment-debtor is a step in aid of execution—*Suresh v. Mahabir* 33 All 279

716 Step, what is not—An application by a decree holder asking for the release of a portion of the property from attachment for postponement of the sale and for the striking off the case off the file the attachment of the remainder of the property being maintained is not an application to take some step in aid of execution because it does not aid or advance the execution proceedings—*Abdul Husein v. Fathun* 20 Cal. 255 *Fakir v. Ghulam* 1 All 355

When a person goes to serve notice on the judgment-debtor as mentioned in clause 6 the mere fact that the decree holder accompanied the person to identify the judgment-debtor is not itself a step in aid of execution—*Jugalbikhor v. Chintamani* 18 C. W. N. 1233, nor does the filing by the person of an affidavit of service of the notice on the judgment-debtor amount to a step in aid of execution—*Annapurna v. Dharendra*, 24 C. W. N. 55

Where a decree has been lost or destroyed, an application to the Court to reconstruct the decree is not a step because it is needless for the decree-holder to have the decree restored before he applies for execution. Limitation will run from the date when the judgment was pronounced—*Raj Gir v. Ishwardhari*, 11 C. L. J. 213

An application by a decree holder who has himself purchased the judgment-debtor's property, to receive the amount of poundage fee from him is not a step in aid of execution—*Ighore Kali v. Prasanno* 22 Cal. 827, *Anand v. Harasundari* 23 Cal. 196

An application by the decree holder for return of the decree to him for the purpose of enabling him to execute his decree subsequently is no a step—*Mahalinga v. Narayana*, 6 M. L. J. 23, *Aghore Kali v. Prasanno* 22 Cal. 827 *Rajaram v. Banaji* 22 Bom. 311

An application made by both the parties to postpone the hearing of pending execution with a view to arrive at a compromise is not a step in aid of execution, because such an application is not made in furthering the execution of a decree, but on the contrary it is a step which if successful would avoid the necessity for execution—*Vishnu v. Narasimha*, 25 L. R. 470 A. I. R. 1923 Bom. 461

An application by the decree holder to be allowed to set off the pure

the payment and not the *payment* itself that can be considered as a step-in aid of execution consequently if a decree is made in 1915 and a payment is made in January 1918 (within 3 years from the date of the decree) but an application for execution (together with an application for certifying the payment) is made in January 1920 the execution is barred—*Narayana v Kunka Raman* 70 L. W. 190 8 Ind. Cas. 743 A. I. R. 1915 Mad. 131.

So also an application made by the judgment-debtor and signed by the decree holder to have certain payments which were made out of Court certified and praying that time be allowed to pay the balance of the decree the attachment in the meantime continuing is a step-in aid of execution—*Hasi Iman v Poonit Singh* 50 Cal. 696.

Application to proceed with the case—On an objection being put in by the judgment-debtor to the execution the Court ordered the parties to produce evidence in support of their respective cases and in the course of those objection proceedings the decree holder filed a list of witnesses and intimated to the Court that he was ready to proceed with the case. It was held that this should be taken to be an application to the Court to take some step-in aid of execution—*Brojendra v. Dil Mahomed* 22 C. W. N. 107.

To have objections dismissed—An application to the Court executing a decree asking that certain objections to the execution of the decree be dismissed is a step-in aid—*Tarunmishra v. Vajju* 16 A. L. J. 704.

For arrest of surety—An application asking the Court to execute the entire decree by the arrest of the surety who has made himself liable for satisfaction of the decree is an application to take a step-in aid of execution of the decree as against the original judgment-debtor—*Mahomed Hafiz v. Mahomed Ibrahim* 43 All. 152.

For arrest of judgment debtor—An application for execution of a decree by arrest of the judgment-debtor will operate to save limitation in respect of a subsequent application in which the prayer was first for the arrest of the judgment-debtor and secondly for the arrest of two persons who had become sureties for the due satisfaction of the decree by the judgment-debtor—*Nadruddin v. Muhammad Hafiz* 44 All. 743.

For final decree for sale—An application by the holder of a preliminary decree in a mortgage suit for a final decree for sale is a step-in aid of execution—*Gulappa v. Erava* 46 Bom. 269 A. I. R. 1912 Bom. 118.

Compromise—A compromise to have the rest of the decree executed on a future date is an application for taking a step-in aid of execution—*Bisdeswari v. Awadh Behari* 6 Ind. Cas. 366.

Application for adjournment—An application for adjournment of the hearing of an execution application to enable the decree holder to produce an encumbrance certificate in respect of the attached property is a step-in aid of execution—*Abdul Kadir v. Krishna Malanmat* 38 Mad. 695 *Munisami v. Muthia* 33 Ind. Cas. 79 (Mad.)

Where a decree has been lost or destroyed an application to the Court to set aside the decree is not a step because it is needless for the decree holder to have the decree restored before he applies for execution. Limitation will run from the date when the judgment was pronounced—*Raj Gir v Ishwarsihari* 15 C L J 213

An application by a decree holder who has himself purchased the judgment-debtor's property, to receive the amount of poundage fee from him is not a step in aid of execution—*Aghore Kali v Prosonno* 22 Cal 817, *Anand v Harasundari* 23 Cal 196

An application by the decree holder for return of the decree to him for the purpose of enabling him to execute his decree subsequently is not a step—*Mahalinga v Narayana* 6 M L J 23 *Aghore Kali v Prosonno*, 22 Cal 817 *Rajaram v Banaji* 22 Bom 311

An application made by both the parties to postpone the hearing of a pending execution with a view to arrive at a compromise is not a step in aid of execution because such an application is not made in furthering the execution of a decree but on the contrary it is a step which if successful would avoid the necessity for execution—*Vishnu v Narasimha* 25 Bom, L R 47 A I R 1923 Bom 462

An application by the decree holder to be allowed to set off the purchase-

money of the property purchased at auction by the decree holder himself, against the decree, instead of paying it into Court is not a step in aid of execution—*Anando v Harasundari*, 23 Cal 195. Contra—*Safia Begam v Raisunnissa* 8 O C 161, *Nabafawp v Bepin* 12 C W N 621.

An application by the decree holder for sanctioning an agreement to give time to the judgment-debtor for payment and not for execution of the decree, is not a step in aid of execution—*Barrow v Joverchand*, 19 Mad 67.

An application by the decree holder for a list of the properties attached in execution of his decree is not a step in aid of execution—*Ringa Chariar v Balaramasami*, 21 Mad 400.

An application by a decreeholder opposing the application of the judgment-debtors to sell the property in a certain order, is not a step in aid of execution—*Troly'ohya v Jyoti Prakash* 30 Cal 761 (771).

Where an application for execution by an assignee of a decree from an adult decree holder who transferred the same on behalf of himself as well as his own minor brothers was dismissed in toto, as leave of the Court was not obtained for the assignment, such application, being made by a person not entitled to make it, was not a step—*Kailasa v Ramnaya*, 6 L W 19.

An application which asks for a relief beyond and outside the decree altogether is not a step in aid of execution—*Pandarinath v Lila Chand*, 13 Bom 237, *Banda v. Narasimha*, 37 Bom 42, *Nathabhai v Pranjivan*, 34 Bom 189.

An application for time to pay a decree amount is not a step in aid of execution—*Karlick v Juggernath* 27 Cal 283.

In the absence of an application to proceed with the sale, the mere filing of an affidavit by the decree holder stating that there are no incumbrances over the property does not amount to a step in aid of execution—*Chiranjiv v Ganga Sahai*, 22 A L J 410 A I R 1914 All 811.

Where a judgment-debtor has applied for insolvency and the insolvency proceedings are pending, no application for execution can be made against him and any resistance by the decree holder to the judgment-debtor's insolvency proceedings will not be a step in aid of execution—*Langtu v. Baijnath*, 28 All 387.

Application for copy of decree—An application by a decree holder for a copy of the decree is not a step in aid of execution—*Gopisundhu v Domburru*, 11 Mad 336, *Ganga Pershad v Debi Sundari Dabhi* 11 Cal 227, *Rajkumar Banerjee v Raj Lakshmi Debi*, 12 Cal 441, *Muthia Veettil v Irakkal Karnaian*, 39 M L J 572.

To bring decree into conformity with judgment—An application to amend a decree or to bring a decree into conformity with the judgment cannot be treated as a step in aid of execution—*Kallu v Fakiman*, 13 All 124, *Daya Kishen v. Nanki Begam*, 20 All 304, *Ashunulla v Dakhani*,

2^o All 550. P^o when an ¹ am¹ is made by the Court it will give a fresh starting point of limitation for the execution of the decree under clause 4.

For a sale of execution.—An application by the decree holder for the execution proceedings is not a step in all of execution—*Fakir v Ghulam* 1 All 353.

For postponement of sale.—An application by the decree holder for postponement of sale in execution on the ground that he had allowed time to the judgment-debtor is not a step in all of execution—*Mahabab Iwar v Debi Balakrishna* 3 All 357. An application by the decree holder for postponement of the sale not with a view to enable him to bring the properties to sale more advantageously to him but on other grounds is not a step in all of execution—*Trothaya v Jyoti Prakash* 30 Cal 761. But a joint application made by the decree holder and judgment-debtor stating that a certain payment has been made by the judgment-debtor and that the decree holder has agreed to give time to the judgment-debtor for the payment of the balance and praying that the sale may be postponed and time granted constitutes a step-in-all of execution—*Sidda v Sheo Prasad* 4 All 60.

To take out money.—According to the Calcutta High Court and Punjab Chief Court an application made by a judgment-creditor to take out of Court certain monies deposited by the judgment-debtor or to withdraw a money awarded to him upon rateable distribution or to take out the proceeds of an execution sale of the judgment-debtor's property is not a step in all of execution. The reason is that so long as the money or the fund out of which payment is sought has not been realised in execution an application for payment of the money is an application to take a step in all of execution. But when the moneys have been realised and are lying in Court an application for payment of the money is an application for merely a ministerial order and not to take a step in all of execution—*Hem Chunder Choudhury v Brojo Sundari Devi* 8 Cal 89. *Fazal Imam v Mella Singh* 10 Cal 549. *Gunga Pershad Bhoomik v Debi Sundari Dabia* 11 Cal 227. *Sadananda v Kali Sanhar* 10 C W N 28. *Kasu v Atar Singh* 103 P R 1908. *Mulchand v Kour Singh* 27 P R 1888. But according to the other High Courts it is a step—*Venkatarayulu v Narasimha* 2 Mad 174. *Koormayya v Krishnamma* 17 Mad 165. *Puran Singh v Jawahir Singh* 6 All 366. *Kerala Verma v Shangarm* 16 Mad 452. *Bapuchand v Mugut Rao* 22 Bom 340. *Sujan Singh v Hira Singh* 12 All 30. *Mulchand v Jamanb* 27 Bom L R 671. A I R 1925 Bom 443.

The Madras High Court has made another kind of distinction viz that if the monies lying in Court are the proceeds of an execution sale the application by the decreeholder for payment of the money is a step-in-all of execution but if the monies lying in Court are not the proceeds of a sale in execution of the decree, but have been deposited by the judgment

debtor (or his agent) for payment to the decreeholder the decreeholder's application for payment is not a step in aid of execution—*Balaguruswami v Guruswami* 48 M L J 506 A I R 1925 Mad 703 87 Ind Cas 989 *Appaswami v Jotha Naicken* 22 Mad 448 The Bombay High Court has expressed the opinion that there is no difference between money paid into Court in satisfaction of a decree and money lying in Court which is the proceeds of a sale held in execution of the decree—*Mulchand v Jamnani* (supra)

For confirmation of sale—As the Court is bound to confirm a sale after thirty days in the event of no application under section 311 C P C being made an application to confirm the sale cannot be regarded as one in aid of execution even though it is made by the decree holder as purchaser—*Umesh v Shib Narain* 31 Cal 1011 (dissenting from *Gobind v Runga* 21 Cal 23 and *Kewal v Akhadim* 5 All 576) *Panchanan v Nrisinha* 11 C L J 356 *Triloke Nath v Bansman* 2 Pat 249 A I R 1923 Pat 22

717 Clause 6—Notice—An application for the issue of a notice to the judgment-debtor (without any other prayer) to show cause why the decree should not be executed against him is an application to keep the decree in force and limitation should be computed from the date on which notice to the judgment-debtor was issued—*Beharilal v Salik Ram* 1 All 675

A notice to shew cause why a decree should not be executed is not required by the C P Code in the case of an application for transmission of a decree for execution to a Court in a Native State and consequently the case does not fall within clause 6—*Pierce Leslie v Perumal* 40 Mad 1069 (F B)

The words 'in accordance with law' occurring in clause 5 cannot be introduced into clause 6 when the Legislature has not thought fit to do so and therefore the issue of a notice even though it is issued upon an application which is not in accordance with law is still sufficient to save limitation—*Varadaraja v Murugesam* 39 Mad 923 *Deo Narain v Sri Bhagawat* 10 Ind Cas 411 *Dhotkal v Phaklar* 15 All 84 (F B) *Jamna v Bishnath* 6 A L J 944 *Gobarilhan Das v Satis Chandra* 1 Pat 609

As regards the date from which the period of limitation is to be computed, the decisions are not unanimous. It has been held in some cases that time runs from the date on which the notice is actually issued and not from the date on which the Court ordered the issue of notice—*Cheruvath v Nerath* 30 Mad 30 *Ratan v Debnath* 10 C W N 303 *Kedaressur v Mohini* 6 C W N 656 *Maharaja of Jaipur v Lalji* 12 A L J 1006 *Nilkanth v Ragho* 20 Bom L R 351 while in some other cases the period has been held to run from the date of the order of the Court directing notice to issue—*Kalika Baksh v Ram Charan* 40 All 630 (F B) *Damodar v Sonaji* 27 Bom 672 *Gowind v Dada* 28 Bom 416 *Hari Ganesh v Yamunabai* 23 Bom 35, *Jumai v Abdul* 30 All 536

Where there was in fact no application for notice and the Court did not send any mere application for execution made more than a year after the decree cannot be treated as an application for notice on the ground that the Court would in the ordinary course send notice—*Ramayyan v Kadir Bacha* 31 Mad 68 (69) Where no notice has been issued at all, the mere order for issuing a notice cannot give a fresh starting point of limitation—*Hari v Yamunabai* 23 Bom 35 Note the words 'has been issued' in this Article It is not however necessary for this clause that the notice must have been actually served—*Damodar v Sonaji* 27 Bom 622

Where the notice for the execution of a decree is forwarded by the executing Court to another Court within the local limits of which the judgment-debtor resides the period of limitation runs from the date on which the notice actually left the former Court and the fact that in the Court of service it was made over to a peon on a later date cannot extend the period of limitation—*Annapurna v Dharendra* 24 C W N 55

718 **Clauses 5 and 6**—Clauses 5 and 6 of Art 182 are not mutually exclusive Where an application to take a step under Cl 5 has been made after issue of notice under Cl 6 the starting point for limitation is the date of the application to take a step and not the date of issue of notice—*Isahut v Mi Hla* 12 Bur I T 74

719 **Claus 7**—**Instalment decrees**—When a decree is made payable by instalments, with the further provision that in default of payment of any instalment the whole of the money shall become due and be recoverable by execution, limitation for execution begins to run when the first default is made—*Mon Mohun v Durga Churn* 15 Cal 502 (505) *Bir Narain v Darpa Narain*, 20 Cal 74 *Judhistur v Volin* 13 Cal 73 (75) *Zakur Khan v Bhaktawar*, 7 All 327 (330) *Dulsook v Chugon* 2 Bom 356 *Shib Dal v Kalka* 2 All 443 *Shankar v Jalsi* 16 All 371 (372) *Ugrasak v Lagasmani*, 4 All 83 (85) *Raichard v Dharwad* 42 Bom 728 *Chakar v Anur*, 38 All 201 (207) *Allah Bakh v Bhanum* 100 P R 1902 *Sa Flahy Dux v Nawal Lal* 4 P I J 151 (162) Where payments were made towards an instalment decree (which contained the usual default clause) but such payments were not certified the Court would assume that no payments were made and so the period of limitation ran from the date when the first instalment was due—*Chatar Singh v Amir Singh* 38 All 204 (207); *Mithu Lal v Akshar* 12 All 569 (570) Where an instalment decree directed that in case of failure of payment of an instalment the decreeholder was to wait for one year and that if during that time the debtor did not pay the amount of the instalment, the decreeholder would be entitled to recover the whole amount and that the time for the execution of the decree ran from the expiry of one year after the date of default—*Hira Chand v Aba Lal*, 46 Bom 761, A I R 1922 Bom 95.

Waiver —On the application of the principle of Article 75 it has been held that even though an instalment decree provides that on default of payment of any one instalment the whole amount shall become due it is open to the decreeholder to waive the default by accepting an overdue instalment (instead of putting into force the decree for the whole amount at once upon the default) and to apply for execution in respect of a subsequent instalment on a fresh default and this application will not be barred on the ground that more than three years have elapsed after the first default—*Ram Culpoo v Ram Ghunder* 14 Cal 352 (355) *Mon Mohun v Durga Charan* 15 Cal 502 (505) *Kashiram v Pandu* 27 Bom 1 (13) F B *Hurri Pershad v Nasib Singh* 21 Cal 542 (546) *Rajeswar v Hari* 19 Mad 162 In two earlier Bombay and Allahabad cases it was held that since in this clause no mention is made of waiver as in Article 75 the principle of waiver did not apply to instalment decrees. A decree holder was therefore always bound to take out execution within 3 years from the first default—*Dulsook v Chugon* 2 Bom 356 *Ugrah Nath v Laganmani* 4 All 83 (85) But the Bombay case is impliedly overruled by 27 Bom 1 (F B) cited above.

Where a decree payable by instalments provides that the decree holder shall have *discretion or option* on default being made in payment of any one instalment to realise the full amount of the decree with interest without waiting for any future instalment the period of limitation does not necessarily run from the date of the first default—*Janki v Ghulam Ali* 5 All 201 (206) This clause applies only where the decree directs any payment to be made on a certain date. If however the decree provides that the decreeholder shall have *discretion* to realise the whole decretal money when the default is made the date of default cannot be taken as being the date directed by the decree. In such a case the decreeholder is not bound to execute his decree for the whole amount remaining due as soon as the first default is made, but he may waive the default by receiving the overdue instalment and execute the decree for the subsequent instalments as they become due. Time runs from the due date of each instalment—*Lachmi v Sarju* 39 All 230 (233) *Nilmadhuv v Ramsodoy* 9 Cal 857 (860) *Appayya v Papayya* 3 Mad 256 *Allah Baksh v Bhawanji* 100 P R 1902 *Hishen Chand v Bhai Gopal* 6 P R 1913 16 Ind Cas 842, *Shankar v Jalpa* 16 All 371 (374) In such a case the decreeholder's omission to apply for execution of the whole decree within three years of the first default will only affect his right to recover the instalment in respect of which the default was made and to recover the whole of the decretal amount at once but will not affect his right to recover subsequent instalments which fell due within three years before the application for execution—*Asmutulla v Kally Churn* 7 Cal 56 (60) *Allah Baksh v Bhawanji* 100 P R 1902 *Hishen Chand v Bhai Gopal Singh* 6 P R 1913.

In order to constitute waiver, there must be *payment and acceptance of an overdue instalment*. The mere silence on the part of the decreeholder, or his abstinence from suing after there has been a default, does not amount to a waiver on his part—*Hurri Pershad v. Nasib Singh*, 21 Cal 542 (547); *Bir Narain v. Darpa Narain*, 20 Cal 74 (78) *Kashiram v. Pandu*, 27 Bom. 1, *Chaitar Singh v. Amir Singh*, 38 All 201 (207). And this is so, whether the decree provides that on nonpayment of an instalment the whole amount shall become due, or it provides that on nonpayment of an instalment the whole amount may be sued for—*Hurri Pershad v. Nasib Singh* (supra). There must be proof of payment of the overdue instalment. Where the decreeholder alleged payment of an instalment by the judgment-debtor, which the latter denied, and the payment has not been certified, held that there was no evidence of payment, and consequently no evidence of waiver, and therefore limitation ran from the date of the first default—*Mithu Lal v. Khairah*, 12 All 560 (571). But see *Zahur v. Hakkisar*, 7 All 327 (330), *Rajeswara v. Hari*, 19 Mad 162 and *Hurri Prasad v. Nasib Singh*, 21 Cal 542 (549) where it was held that the mere fact that the payment was not certified was not a ground for holding that the payment cannot be recognized by the Court in evidence of waiver.

So long as there is no waiver, the decreeholder is entitled to execute the whole decree (i.e. for the whole amount remaining due) as soon as a default is made, but if the decreeholder waives a default by receiving an overdue instalment, he cannot, upon a subsequent default put in force the decree as a whole, to recover the remaining instalments that are due all at once, he can execute the decree only for those instalments which are due. Time in respect of each such instalment runs from the due date of that instalment—*Mithu Lal v. Khairah* (supra) 12 All 562 (571) *Nuruddin v. Kamalodoy*, 11 Cal 857 (863), *Kash Prasad v. Bhagwan* 11 All 253 (292). In other words, the acceptance of the overdue instalments will amount to a waiver of the decreeholder's right to entitle the penalty which the decree allowed to him in the event of failure to pay the instalments—*Kash Prasad v. Bhagwan*, (supra).

If the decree holder wishes to execute the entire decree owing to default in the payment of instalments, he must bring his application within three years of the date of the first default. If he brings his application to execute the whole decree more than three years after the date of the first default, he will not be allowed, in order to save his application from limitation, to fall back upon the instalment arrangement and claim to recover the instalments that fall due within three years before the date of the application—*Bir Narain v. Darpa Narain*, 20 Cal 74 (78).

So also, when the holder of an instalment decree has once accepted the execution of the entire decree, upon a default being made in the payment of an instalment, and has thus elected to put an end to the instalment arrangement, he cannot subsequently fall back on the instalment

decree relating to payment by instalments, for the purpose of saving limitation. Thus, where upon the judgment-debtor's failure in the payment of two instalments in 1900 the decreeholder applied for execution of the decree for the whole amount on the 15th May 1901, but the application having been dismissed for default of prosecution, he again applied on the 1st July 1904 for execution, for recovery of such instalments as remained unpaid, held that the application was barred by limitation, as it was no longer open to the decreeholder to adhere to the instalment arrangement—*Bhagwan Das v Janki* 28 All 249 (251)

The question whether the decree holder may waive the benefit of the provision or must execute his decree within 3 years from the due date of the first instalment of which default is made in payment, is a question purely of construction to be decided on the terms of the whole decree in each case—*Judhistir v Nobin* 13 Cal 73 (75). An instalment decree is to be construed as much as possible in favour of the decree holder, and unless the decree clearly leaves the decree holder no option on the happening of a default but to execute the decree once and for all for the whole amount under it, the decree holder may execute it on the happening of the first, second or any subsequent default, and limitation will run against him in respect of each instalment separately from the time when such instalment may become due—*Shankar v Jalpa* 16 All 371 (373), *Lachmi Narain v Sarju*, 39 All 230 (233). *Allah Baksh v Bhawani*, 100 P R 1902

In a suit on a promote, a compromise petition for instalment decree was filed in which there was a provision that default being made in the payment of one *kist* the whole amount would become due, and subsequently an instalment decree was passed in which the amount was decreed as per instalments but the condition as to the whole amount being due in default of payment of one *kist* was not stated. It was held that the decree and the compromise petition might be taken together and that the terms of the compromise should be taken as incorporated into the decree, so that the decree must be construed as one providing that the whole amount of the decree would become due on the default in payment of one *kist*—*Jayanuddin v Jamiruddin*, 21 C W. N 835, 37 Ind Cas 913

Certain date —Where a decree directed that the amount decreed should be paid on the expiration of 3 years, the period of limitation for execution ran from the day on which the period of 3 years from the date of the decree expired, and therefore an application made within 8 years from the date of the decree was within time—*Ram Lal v. Natha Singh*, 45 P R 1882

Where a decree directs that a certain sum shall be paid 'annually' or 'monthly,' it is not a decree for money to be paid 'on a certain date' within the meaning of this clause, and limitation will run from the date of the decree. In order to bring a case within this clause, a definite date in each month or year should be inserted in the decree for the payment of

each instalment—*Subhanatha v Lakshmi Ammal*, 7 Mad 80; *Yusuf v. Sirdar*, 7 Mad 83 But the Bombay High Court holds that such a decree means that the amounts decreed are to be paid monthly or yearly from the date of the decree *i.e.* on the date of each month or year corresponding to the date of the decree—*Lakshmbai v Madhavray*, 12 Bom 65, see also *Alid Kamaruddin v Piar Lal*, 13 P R 1892 In later cases the Madras High Court has also held that if it can be gathered from the decree that payments are directed to be made on dates or at periods which are sufficiently indicated by the terms of the decree, the requirements of this clause are satisfied—*Kaveri v Venkanna*, 14 Mad 396 Thus, where a decree directed the defendants to pay maintenance to the plaintiff at a certain rate per year from the date of the plaint, which was 18th July 1876, until her death, it was held that the proper construction of the decree was that payment should be made on the 18th July 1877 18th July 1878, and so on in every subsequent year on the corresponding date; and so the decree was one which directed payment to be made on a certain date—*Aisamma v Naraina*, 30 Mad 501

Where a money decree directs that the plaintiff should not be entitled to take out execution of the decree until the disposal of the petition for insolvency made by the defendants, *held* that clause 7 cannot apply, because there is no direction in the decree that any payment is to be made at the date of the disposal of the insolvency petition or on any other date—*Ashrafuddin v Depin Behari*, 30 Cal 407 (412)

A decree which directs the sale of the mortgaged property in default of payment of the mortgage-money within the date fixed in the decree is not a decree 'directing the payment of the amount to be made on a certain date' within the meaning of this clause and an application for sale of the property upon non payment of the money within the date fixed is not an application to 'enforce payment of the money' This clause does not apply and the application falls under Article 181 If, however, there is also a personal decree against the mortgagor, and the application is to enforce the decree as such, then execution will run from the date of the decree under clause 1 if payment is enforceable under the decree from the date thereof, or from a future date under clause 7 if payment can be enforced only on or after such date as is fixed in the decree—*Rungiah Goundan v Nanjappa*, 26 Mul 1881, also 16 All 237 cited in Note 693 under Article 181.

If a decree passed made in three instalments—15, 1914, and the 15th October 1914, 15 3-1915, 15

in 1911 directed payment to be 1912, March 15, 1913 and March 15, 1914, and the 15th October 1914, must be taken to be effect of confirmation by the 307. 305.

720 Explanation I—Separate rights and liabilities —Where a decree is passed separately against several persons an application for execution against one of them is inoperative to keep the decree alive against the others—*Ghulam Muhiuddin v Damber Singh* 40 All 206 (09) A decree against one person for arrears of rent of one period and against another for rents for another period must be taken as a separate decree against each for the portion for which each is declared liable and consequently the execution proceedings against one would not prevent the law of limitation from barring the execution against the other—*Wise v Rajnarain* 10 B L R 258 (F B)

Where a plaintiff obtained separate decrees against several persons in respect of several duties which they were to perform separately and the plaintiff chose to proceed in the first instance against some and not against the others in taking out execution it was held that the proceedings taken at different times were not continuous and that limitation would run separately from the date of the latest action in each case—*Hurryhur v Hriday* 25 W R 310

A decree which specified different sums as being realisable from three distinct tenures must be construed as three distinct decrees and a prior application in respect of the sum decreed so far as one of the tenancies was concerned could not operate to save limitation for the sum due under the other tenancies—*Dhirendra v Nischintapore Co* 36 Ind Cas 398 (Cal)

Where a decree was passed originally in favour of one person and was afterwards owned by more persons than one in severalty by virtue of assignment from the original single decree holder it cannot be said that the decree has been passed severally in favour of more persons than one within the meaning of the first sentence of this Explanation. The rights of all the several decree holders in this case will be treated as joint and an application for execution made by one of them will keep the decree alive in favour of all—*Venkata Reddappa v Yera Kappa* 45 Mad 35 A I R 1912 Mad 119 69 Ind Cas 777

721 Joint rights and liabilities —Where the Court allowed some of the joint decree holders to execute a certain proportion of the decree for their own benefit it was held that such proceedings would operate for the benefit of all in respect of limitation—*Shib Chunder v Ram Chunder* 16 W R 29 *Ponampilath v Batoli* 3 Mad 79 So also where a decree holder executed a proportional part of a decree for costs against some of the joint defendants such execution would keep the decree alive against all—*Sheikh Binead v Jugessir* 6 W R Mis 75 So long as one part of an indivisible decree is executed the whole is kept alive so far as limitation is concerned—*Doyi Moyet v Alimonee* 25 W R 70 According to the Allahabad High Court however a decree passed jointly in favour of more persons than one can be executed by one or more of such persons as a whole for the benefit of all and not partially to the extent of the

interest of each individual decree holder. An application for such part execution is not one in accordance with law and cannot keep the decree in force—*Collector v Surjan* 4 All 72. *Ram Aulra v Ajudhia* 1 All 231. *Banarsi v Maharani* 3 All 27. But where an application for such part execution is made and no objection is taken to execution in this form it would save limitation as regards the whole decree in favour of all the decree holders—*Nanda v Raghunandan* 7 All 28.

A decree for partition is a decree in favour of both the plaintiff and the defendant consequently an application by the plaintiff (one co sharer) to execute it will keep it alive in respect of a subsequent application by the defendant (another co sharer) for execution—*Sheikh Khoorshed v Nubbee*, 3 Cal 551. *Mohun Chunder v Mohesh Chunder* 9 Cal 568. *Vasudeva v Pithal Sas'ry* 43 M I J 379 A I R 1922 Mad 456. *Ramasami v Varyana* 42 M L J 94 A I R 1922 Mad 327.

A father obtained a decree declaring him entitled to a share of certain property on partition, but never executed it. Subsequently his son obtained a decree declaring him entitled to a certain share of what the father should obtain under the former decree and applied to execute his father's decree, giving notice to his father who refused to join in the application. Subsequently the father applied to execute his decree. It was held that although the effect of the son's decree was not to make him and his father joint decree holders in respect of the father's decree, the son was a transferee of part of his father's decree and was entitled to make the application he had made which was consequently an application in accordance with law and kept the father's decree alive—*Ramasami v Andai Pillai* 14 Mad 252 (reviewing *Ramasami v Andai Pillai* 13 Mad 347).

Where a decree awards mesne profits against A and B jointly and costs against A, B and C jointly an application to execute the decree for mesne profits against A and B keeps alive the right to execute the decree for costs against C—*Subramania v Alagappa* 30 Mad 269 followed in *Pullayya v Pullinayya* 47 M L J 608 A I R 1925 Mad 152.

Where a decree is jointly passed against all the defendants in one matter, and severally against different defendants with respect to other matters, the first portion of this Explanation should apply to that portion of the decree which is passed severally, and the second portion of the Explanation will apply to that portion of the decree which is passed jointly. In such a case, the execution of the joint portion of the decree against one of the joint judgment-debtors will not keep the decree alive so as to save from limitation an application for execution of the several portion of the decree against a judgment-debtor who was not a party to the previous execution proceeding. Because, while the decree holder was executing the joint portion of the decree against one of the joint judgment-debtors there was nothing to prevent him from executing the other portions of the decree against the several judgment-debtors who were liable thereunder.

—*Sahu Nandlal v Sahu Dharam* 48 All 377, 24 A I J 465 94 Ind Cas 961, A I R 1926 All 440 But the Madras High Court holds that a decree is a joint decree if any portion of the relief given in the decree is against the defendants jointly even though some other reliefs may be given against each defendant separately—*Pattannaya v Pattayya* 50 M L J 215 A I R 1926 Mad 453 (following 30 Mad 268)

The Explanation lays down that where a decree has been passed jointly against more persons than one, the application if made against any one or more of them shall take effect as against them all But this Explanation does not say that an order made on such an application is to be binding against all Therefore where a decree was passed against 4 persons and an application for execution was made against two of them after the period of limitation, but nevertheless the Court ordered execution the order was not binding on the other two judgment-debtors who were not parties to the execution proceedings and consequently they are not precluded from showing that the previous application was time-barred—*Harendra Lal v Sham Lal*, 27 Cal 210 (215 216)

Where in a mortgage suit against the members of a joint Hindu family, it was found that a portion only of the mortgage debt was incurred for legal necessity, and in respect of such portion the usual mortgage decree was passed against all the defendants and simultaneously a simple money decree for the balance was passed against the two executants of the bond in suit, held that the decree holder's application for execution of the decree for sale would keep alive the simple money-decree passed against two of the defendants—*Ram Brichh Rai v Deoo Tewari* 14 All 166 65 Ind Cas 358 A I R 1922 All 388

An application for execution against one of the representatives of a sole judgment-debtor saves limitation against all the representatives because the liability of all the representatives is a joint one—*Krishnaji Janardan v Murarav* 12 Bom 48 *Ram Anuj v Hinghku Lal* 3 All 517 *Adusupalli v Marikuruthu* 22 M L J 160 13 Ind Cas 313

Similarly an application for execution by some only of the decree-holder's legal representatives, though not purporting to be on behalf of the other legal representatives also is sufficient to save limitation as regards all—*Vasudatapalla v Narayanapanigrahi*, 1916 M W N 112

Where a surety was liable for the principal debt only and not for interest and costs, an application for execution against the surety cannot operate to keep the decree alive in respect of a subsequent application for execution against the principal debtor to recover the interest and costs, because there was no joint liability of the surety with the principal debtor for interest and costs—*Kusaji v Vinayak*, 23 Bom 478

Where before or after the passing of a decree a party has stood as surety for the due performance of the decree, it may be executed against the surety in the same manner as it may be executed against the defendant, under

sec 253 C. P. Code 1882 (sec 145 of the present Code) But that does not imply that the surety is jointly liable with the principal debtor or that the decree is "jointly passed" against the principal debtor and surety within the meaning of this Explanation Unless the decree is expressly passed against both of them jointly no joint liability will be deduced by combining the surety bond with the provisions of sec 253 of the C. P. Code, and an application for execution against one will not keep the decree alive against the other—*Narayan v Timmaya*, 31 Bom 50, *Yusuf Ali v Sayad Amin*, 47 Bom 778 25 Bom L R 810, A I R 1923 Bom. 366, *Birendra v Tulsī Churn*, 85 Ind Cas 657 (Cal)

If a decree is passed jointly against the judgment-debtor and his sureties, an application for execution against a judgment-debtor or against any one of the sureties affords a starting point for a fresh period of limitation in respect of a subsequent application, even though this latter application is made against a different surety—*Badr-ud din v Muhammad Hafiz*, 44 All 743 (744) 20 A L J 726, A I R 1922 All 481.

A decree was passed against some major persons and two minors. Application was at first made to execute the decree against the minors. The decree as against the minors was set aside on objection being taken by them. The decree holders thereupon applied to execute the decree against the major judgment-debtors. Held that the prior application against the minors only took effect against all the judgment-debtors, and helped to keep the decree alive, as the liability of the minors and the majors was a joint liability—*Lalla Prasad v Suraj Kumar*, 31 All 309.

The latter portion of the 2nd para of the Explanation I lays down that if the judgment creditor does something which keeps alive a joint decree as against one of his joint judgment-debtors, the decree is to be regarded as alive as against all the joint judgment-debtors, and if it is alive, it is of course capable of execution. But where one of the joint judgment-debtors has prevented the decree holder by fraud or force from executing his decree against that judgment-debtor, he is no doubt entitled to claim extension of time against that person, but not against the other judgment-debtor who has not prevented him by force or fraud. Explanation I does not apply to this case, because the judgment creditor has done nothing to keep alive the decree but relies upon something (i.e., fraud or force) which one of his judgment-debtors has been doing—*Atul Khader v Ahmad*, 34 Mad 419 (122).

Explanation II—Proper Court—See Note 710 ante

183.—To enforce a judgment, decree or order of any Court established by Royal Charter in the exercise of	Twelve years.	When a present right to enforce the judgment, decree or order accrues to some person.
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its ordinary original civil jurisdiction, or an Order of His Majesty in Council

Twelve years

of releasing the right. Provided that when the judgment, decree or order has been revived or some part of the principal money secured thereby or some interest on such money has been paid or some acknowledgement of the right thereto has been given in writing signed by the person liable to pay such principal or interest, or his agent, to the person entitled thereto or his agent, the twelve years shall be computed from the date of such revivor, payment or acknowledgment or the latest of such revivors payments or acknowledgments, as the case may be.

This Article corresponds to Art 180 of Act V of 1877

722 Order of the Privy Council —Although an order of His Majesty in Council may confirm a decree of the Court below that order is the paramount decision in the suit and any application to enforce it is in point of law an application to execute the order and not the decree which it confirms. Article 183 applies to it and time runs from the date of such order—*Luchman Persad v Kishun Pershad* 8 Cal 218 *Kamini Debi v Aghore Nath* 14 C W N 357 *Falleh Narain v Chundrabali* 10 Cal 551, *Narsingh Das v Narain Das* 2 All 763

But an order of the Privy Council dismissing an appeal for want of prosecution is not an order which judicially deals with the matter in suit, therefore it is not an order contemplated by this Article. The only decree

capable of execution is the High Court's appellate decree and not the order of the Privy Council and consequently Article 182 and not Article 183 applies—*Abdul Majid v Jawahir* 36 All 350 (353) P C (reversing 33 All 154)

An application for execution of a final decree prepared by the District Judge in pursuance of an Order in Council passed on an appeal against a preliminary decree in a mortgage suit is governed by this Article and not by Article 18 since it is really one to enforce an Order of the Privy Council and not the decree of the District Judge. The preparation of the final decree by the District Judge is purely a ministerial act to enable the order of His Majesty in Council to be enforced—*Bhagwanta v Dewan Zamir Ahmad* 3 Pat 596 (605) 5 P L T 451 A I R 19 4 Pat 576

Whether the order passed by His Majesty in Council be right or wrong the Indian Courts are not competent to go behind that order but are bound to give effect to that order and to punctually observe obey and carry the same into execution—*Sonier Singh v Prem Dev* 3 Pat 377 (332)

722A Enforce —Where a High Court in the exercise of its ordinary original civil jurisdiction passed a decree for sale under section 88 of the Transfer of Property Act an application under section 89 of that Act for an order absolute for sale of the mortgaged property was held to be an application to enforce the preliminary decree. The word enforce is not limited to realisation by execution but may have a wider meaning e.g. the passing of an order absolute for sale—*Munna Lal v Sarai* 42 Cal 776 (779) P C (affirming *Arilook v Sarai* 38 Cal 913). This decision was given with reference to the law as it stood before the passing of the C P Code 1908. After the passing of this new Code the application by a mortgage decreeholder under O 34 r 5 is an application for a final decree for sale (as distinguished from a application for an order absolute for sale) and it is doubtful whether the above ruling would apply under the new Code.

An application to enforce an order absolute for sale passed by the High Court must be made within 12 years from the date of passing the order—*Apurba Krishna v Rash Behary* 47 Cal 746

An application for a personal decree under O 34 r 6 C P Code is an application for a new decree and is not an application to enforce a judgment or decree within the meaning of this Article—*Pell v Gregory* 52 Cal 828 (F B) 29 C W N 678 A I R 19 5 Cal 834 89 Ind Cas 1

An application under sec 144 C P Code for restoration to possession of property which had been taken possession of by the other party in execution of a decree of the High Court which had since been reversed by the Privy Council is an application to enforce an order of the Privy Council and is governed by this Article—*Brij Lal v Dadar* 44 All 555 20 A L J 456 66 Ind Cas 545

Where the High Court directed that the appellant should pay costs

to the respondent who thereupon realised the costs but the Privy Council on appeal directed the parties to pay their own costs an application by the appellant under sec 144 C P Code to recover the costs realised by the respondent is an application to enforce the order of the Privy Council and falls under Article 183—*Madhusudan v Birj Lal* 61 Ind Cas 806 (All)

Since an application to enforce a decree is virtually an application for execution of a decree a minor is entitled to claim the benefit of sec 6—*Kurgodigouda v Ningangouda* 41 Bom 625 (629)

723 Decree of the High Court—This Article applies to a judgment of the High Court in its insolvency jurisdiction because such a judgment is one passed by the High Court in the exercise of its ordinary original civil jurisdiction and not by way of special or extraordinary action—*In the matter of Condas Narrondas* 13 Bom 570 (533) (P C)

But a decree does not become a decree of the High Court merely because it has been transferred to that Court for execution and may have to be enforced in the same manner as a decree of the High Court—*per Trevelyan J in Jogemaya v Thackomani* 24 Cal 473 (at p 491) The rule of limitation depends upon the status of the Court which passed the decree and not upon the status of the Court executing it and so if a decree of a mofussil Court is transferred to the High Court for execution the limitation for execution is 3 years and not 12 years—*Tincourie v Debendra* 17 Cal 491 So also a decree passed by the High Court on appeal from a mofussil Court is not a decree of the High Court within the meaning of this Article—*Kisto Kankar v Burrodacant* 10 B L R 101 (P C) 17 W R 292 *Ram Charan v Lakhi Kant* 7 B L R 704 (F B) 16 W R 1

724 Revivor—In using the term 'revivor of judgment in this Article the Legislature had in view the procedure embodied in section 248 of the C P Code the object of which was to give notice so as to prevent undue surprise to a judgment-debtor where more than one year had elapsed between the date of the decree and the application for execution or when the decree was sought to be enforced against the legal representatives of the party against whom the decree was originally made—*Jogendra v Shyam Das*, 36 Cal 543 The Statute of limitations to which the judgment is subject ceases to run upon a revivor of judgment and time runs afresh from the date of the revivor—Ibid

To constitute a revivor of the decree there must be expressly or by implication a determination that the decree is still capable of execution and that the decree holder is entitled to enforce it An order for execution of the decree made after notice to the judgment-debtor as provided for in section 248 C P Code will operate as a revivor because it necessarily implies such a determination—*Kamini v Aghore* 14 C W N 357 *Jogendra v Shyam Das* 36 Cal 543 (dissenting from *Tincourie v Debendra* 17 Cal 491) *Tribikram v Badri* 1 Pat L J 385, *Fulleh Narain v Chundra Bahi* 20 Cal 551 *Ashoolosh v Durga* 6 Cal 504, *Ganapathi v Balasundara*

7 Mad 540 *Suja Hossein v. Monohar*, 24 Cal 244, *Umrao v Lachmi* 26 All 361 But the mere fact that an application has been made and notice has been issued to the judgment-debtor, without their terminating in an order for execution cannot create a revivor of the decree—*Manohar v Fattah Chand* 30 Cal 979

Where the objection of the judgment-debtor was overruled, and it was decided that the decree was not barred by limitation, the effect of the order was to entitle the decree holder to proceed with the execution, and there was consequently a revivor of the decree—*Kamini v Aghore*, 14 C W N 357

An order for execution made after one year from the date of the decree, without issue of notice to the judgment-debtor under section 248 C P Code, has not the effect of reviving the decree—*Venkatesa Perumal v Srinuasa*, 33 Mad 187

Where an Order in Council is transmitted to a subordinate Court for execution without any notice being given to the judgment-debtors, it would not be a revivor of the Order—*Tribikram v Badri*, 1 P L J 385

An application for the transfer of a decree is not itself an application for execution and does not amount to a revivor of the decree—*Chatterput v Saita Sumari Mull*, 43 Cal 903 (F B), *Suja Hussein v Monohar Das* 22 Cal 921, *Khaja Sahebuddin v Afzal Begam*, 28 C W N 963, A I R 1925 Cal 23, even if upon such application an order is passed for transfer of the decree, such an order is not an order for execution, nor does it show that the Court is of opinion that the execution is not barred. It has not the effect of a revivor—*Chatterput v Doya Chand*, 23 C L J 641, *Suja Hussein v Monohar Das*, 22 Cal 921

Where execution cannot proceed without leave of the Court, the granting of the leave is a revivor of the decree. But as no leave is necessary for the arrest of the judgment-debtor, the issue of a notice under section 245B C P Code is not a revivor—*Chatterput v Daya Chand*, 23 C L J 641

As observed before, to constitute a revivor there must be a determination that the decree is capable of execution, and that the decree holder is entitled to enforce it, and such determination must be made by a Court or person duly qualified to make it. Where after issue of notice under sec 248 C P Code, and the judgment-debtor not appearing the Registrar ordered execution to issue, it was held that there was no judicial determination of the question whether the decree was capable of execution, and consequently the order did not constitute a revivor—*Chatterput v Saita Sumari Mull*, 43 Cal 903 (F B)

A revivor of decree against one of two judgment-debtors would not keep the decree alive against the other judgment-debtor—*Krishanayak v. Gajendra*, 40 Mad 1127. A decree was passed against two persons in 1900, in the original side of the High Court. An application was made in 1903 for execution against one judgment-debtor only, and an order was made granting execution against him. In 1914 the decree holder applied for execution against the other judgment-debtor. It was held that this

application was barred in as much as the revivor of the decree against one of the judgment-debtors did not save the decree from being barred as against the other judgment-debtor after 12 years from the date of the decree—*McLaren v Veeriah* 38 Mad 1102

Payment —A fresh starting point is given from the time of payment i.e. the date of actual payment and not the date of order of payment passed by the Court—*Subapathi v Sharmugappa* 46 M L J 453 A I R 1924 Mad 638

The payment is not required to be made either by the judgment-debtor or by some person duly authorised by him in that behalf. It is sufficient if payment is made by some person on behalf of the judgment debtor. The words of section 20 are not to be imported into this Article—*Prabappa v Desikachari* 49 M L J 101 90 Ind Cas 1028 A I R 1925 Mad 1131

725 Section 230 C P Code —This Article is independent of sec 230 of the Civil Procedure Code 1882 (sec 48 of the Code of 1908) and not controlled by it. The 12 years rule contained in that section does not apply to cases governed by this Article—*Mayabai Prembai v Trivuban Das* 6 Bom 258 *Ganapathi v Balasundara* 7 Mad 540 *Fulch Narain v Chandrabai* 20 Cal 551. Section 230 of the Civil Procedure Code ought not to be so construed as to conflict with the provisions of this Article of the Limitation Act. The provisions of the two Acts ought not to be so interpreted as to contradict each other and section 230 of the Code cannot be taken to limit this Article—*Jogendra v Shari Das* 36 Cal 513. Note that section 48 (2) (b) of the new C P Code of 1908 expressly exempts this Article from the operation of that section

SECOND SCHEDULE

TERRITORIES REFERRED TO IN SECTION 31

(See Section 31)

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The Presidency of Bombay

The Sambalpur District of the Bengal Division of the Presidency of Fort William

The United Provinces of Agra and Oudh

Burma

The Central Provinces

Ajmer-Merwara

THIRD SCHEDULE

[REPEALED BY THE SECOND AMENDING AND
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